

102D CONGRESS }  
1st Session }

SENATE

{ REPORT  
102-68 }

## GRANTING EMPLOYEES FAMILY AND TEMPORARY MEDICAL LEAVE UNDER CERTAIN CIRCUMSTANCES

MAY 30, 1991.—Ordered to be printed

Filed under authority of the order of the Senate of May 17 (legislative day, April  
25), 1991

Mr. KENNEDY, from the Committee on Labor and Human  
Resources, submitted the following

### REPORT

together with

### MINORITY VIEWS

[To accompany S. 5]

The Committee on Labor and Human Resources, to which was referred the bill (S. 5) to entitle employees to family and medical leave in certain cases involving a birth, an adoption, or a serious health condition of an employee, a child, a spouse or a parent, with adequate protection of the employees' employment and health benefit rights, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

### CONTENTS

	Page
I. The bill as reported.....	2
II. Summary of the bill.....	23
III. Background and need for legislation.....	25
IV. History of legislation.....	41
V. Committee views.....	41
VI. Cost estimate.....	56
VII. Regulatory statement.....	58
VIII. Section-by-section analysis.....	59

IX. Committee action.....	64
X. Minority views .....	65
XI. Changes in existing law .....	78

## I. THE BILL AS REPORTED

### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Family and Medical Leave Act of 1991”.

(b) **TABLE OF CONTENTS.**—

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purposes.

#### TITLE I—GENERAL REQUIREMENTS FOR LEAVE

- Sec. 101. Definitions.
- Sec. 102. Leave requirement.
- Sec. 103. Certification.
- Sec. 104. Employment and benefits protection.
- Sec. 105. Prohibited acts.
- Sec. 106. Administrative enforcement.
- Sec. 107. Enforcement by civil action.
- Sec. 108. Investigative authority.
- Sec. 109. Relief.
- Sec. 110. Special rules concerning employees of local educational agencies and private elementary and secondary schools.
- Sec. 111. Notice.
- Sec. 112. Regulations.

#### TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

- Sec. 201. Leave requirement.

#### TITLE III—COMMISSION ON LEAVE

- Sec. 301. Establishment.
- Sec. 302. Duties.
- Sec. 303. Membership.
- Sec. 304. Compensation.
- Sec. 305. Powers.
- Sec. 306. Termination.

#### TITLE IV—MISCELLANEOUS PROVISIONS

- Sec. 401. Effect on other laws.
- Sec. 402. Effect on existing employment benefits.
- Sec. 403. Encouragement of more generous leave policies.
- Sec. 404. Coverage of the Senate.
- Sec. 405. Regulations.
- Sec. 406. Effective dates.

### SEC. 2. FINDINGS AND PURPOSES.

(a) **FINDINGS.**—Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) **PURPOSES.**—It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

## **TITLE I—GENERAL REQUIREMENTS FOR LEAVE**

### **SEC. 101. DEFINITIONS.**

As used in this title:

(1) **COMMERCE.**—The terms “commerce” and “industry or activity affecting commerce” mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include “commerce” and any “industry affecting commerce”, as defined in paragraphs (3) and (1), respectively, of section 120 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (3) and (1)).

(2) **ELIGIBLE EMPLOYEE.**—

(A) **IN GENERAL.**—The term “eligible employee” means any “employee”, as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who has been employed by the employer with respect to whom leave is sought under section 102 for at least—

- (i) 1,000 hours of service during the previous 12-month period; and
- (ii) 12 months.

(B) **EXCLUSIONS.**—The term “eligible employee” does not include—

- (i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code (as added by title II of this Act); or
- (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(3) **EMPLOY; STATE.**—The terms “employ” and “State” have the same meanings given such terms in subsections (g) and (c), respectively, of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (g) and (c)).

(4) **EMPLOYEE.**—The term “employee” means any individual employed by an employer.

(5) **EMPLOYER.**—

(A) **IN GENERAL.**—The term “employer”—

- (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

- (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

- (iii) includes any “public agency”, as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).

(B) **PUBLIC AGENCY.**—For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(6) **EMPLOYMENT BENEFITS.**—The term “employment benefits” means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a policy or practice of an employer or through an “employee benefit plan”, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(7) **HEALTH CARE PROVIDER.**—The term “health care provider” means—

- (A) a doctor of medicine or osteopathy that is legally authorized to practice medicine and surgery by the State in which the doctor performs such function or action; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(8) **PARENT.**—The term “parent” means the biological parent of the child or an individual who stood in loco parentis to a child when the child was a son or daughter.

(9) **PERSON.**—The term “person” has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(10) **REDUCED LEAVE SCHEDULE.**—The term “reduced leave schedule” means leave scheduled for fewer than the usual number of hours per workweek, or hours per workday, of an employee.

(11) **SECRETARY.**—The term “Secretary” means the Secretary of Labor.

(12) **SERIOUS HEALTH CONDITION.**—The term “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment or continuing supervision by a health care provider.

(13) **SON OR DAUGHTER.**—The term “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

## **SEC. 102. LEAVE REQUIREMENT.**

### **(a) IN GENERAL.—**

(1) **ENTITLEMENT TO LEAVE.**—Subject to section 103, an eligible employee shall be entitled to 12 workweeks of leave during any 12-month period—

(A) because of the birth of a son or daughter of the employee;

(B) because of the placement of a son or daughter with the employee for adoption or foster care;

(C) to care for the son, daughter, spouse, or parent of the employee who has a serious health condition; or

(D) because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) **EXPIRATION OF ENTITLEMENT.**—The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) shall expire at the end of the 12-month period beginning on the date of the birth or placement involved.

(3) **INTERMITTENT LEAVE.**—Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employer of the employee agree otherwise. Subject to subsection (e), leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary.

(b) **REDUCED LEAVE.**—On agreement between the employer and the employee, leave under subsection (a) may be taken on a re-

duced leave schedule. Such reduced leave schedule shall not result in a reduction in the total amount of leave to which such employee is entitled under subsection (a).

(c) **UNPAID LEAVE PERMITTED.**—Except as provided in subsection (d), leave under subsection (a) may consist of unpaid leave.

(d) **RELATIONSHIP TO PAID LEAVE.**—

(1) **UNPAID LEAVE.**—If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title may be provided without compensation.

(2) **SUBSTITUTION OF PAID LEAVE.**—

(A) **IN GENERAL.**—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subparagraphs.

(B) **HEALTH CONDITION.**—An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under paragraph (1)(D) of subsection (a) for any part of the 12-week period of such leave under such paragraph, except that nothing in this Act shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) **FORESEEABLE LEAVE.**—

(1) **REQUIREMENT OF NOTICE.**—In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or adoption, the eligible employee shall provide the employer with prior notice of such expected birth or adoption in a manner that is reasonable and practicable.

(2) **DUTIES OF EMPLOYEE.**—In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment or supervision, the employee—

(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee; and

(B) shall provide the employer with prior notice of the treatment or supervision in a manner that is reasonable and practicable.

(f) **SPOUSES EMPLOYED BY THE SAME EMPLOYER.**—In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

#### SEC. 103. CERTIFICATION.

(a) **IN GENERAL.**—An employer may require that a claim for leave under subparagraph (C) or (D) of section 102(a)(1) be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide a copy of such certification to the employer.

(b) **SUFFICIENT CERTIFICATION.**—Certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and

(4)(A) for purposes of leave under section 102(a)(1)(C), an estimate of the amount of time that the eligible employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 102(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee.

#### (c) **SECOND OPINION.**—

(1) **IN GENERAL.**—In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1), the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) **LIMITATION.**—A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

#### (d) **RESOLUTION OF CONFLICTING OPINIONS.**—

(1) **IN GENERAL.**—In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) **FINALITY.**—The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) **SUBSEQUENT RECERTIFICATION.**—The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

#### SEC. 104. EMPLOYMENT AND BENEFITS PROTECTION.

##### (a) **RESTORATION TO POSITION.**—

(1) **IN GENERAL.**—Any eligible employee who takes leave under section 102 for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) **LOSS OF BENEFITS.**—The taking of leave under section 102 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) **LIMITATIONS.**—Except as provided in subsection (b), nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than that to which the employee was entitled to on the date the leave was commenced.

(4) **CERTIFICATION.**—As a condition of restoration under paragraph (1), the employer may have a policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees taking leave under section 102(a)(1)(D).

(5) **CONSTRUCTION.**—Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 to periodically report to the employer on the status and intention of the employee to return to work.

(b) **MAINTENANCE OF HEALTH BENEFITS.**—During any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any “group health plan” (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date the employee is restored under subsection (a).

#### **SEC. 105. PROHIBITED ACTS.**

(a) **INTERFERENCE WITH RIGHTS.**—

(1) **EXERCISE OF RIGHTS.**—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.

(2) **DISCRIMINATION.**—It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) **INTERFERENCE WITH PROCEEDINGS OR INQUIRIES.**—It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify in any inquiry or proceeding relating to any right provided under this title.

#### SEC. 106. ADMINISTRATIVE ENFORCEMENT.

(a) **IN GENERAL.**—The Secretary shall issue such rules and regulations as are necessary to carry out this section, including rules and regulations concerning notice of foreseeable leave, service of complaints, notice of hearings, answers and amendments to complaints, and copies of orders and records of proceedings.

##### (b) **CHARGES.**—

(1) **FILING.**—Any person (including a class or organization, on behalf of any person) alleging an act that violates any provision of this title may file a charge respecting such violation with the Secretary. Charges shall be in such form and contain such information as the Secretary shall require by regulation.

(2) **NOTIFICATION.**—Not more than 10 days after the Secretary receives notice of a charge under paragraph (1), the Secretary—

(A) shall serve a notice of the charge on the person charged with the violation; and

(B) shall inform such person and the charging party as to the rights and procedures provided under this title.

(3) **TIME OF FILING.**—A charge shall not be filed more than 1 year after the date of the last event constituting the alleged violation.

(4) **SETTLEMENT PRIOR TO DETERMINATION BY SECRETARY.**—The charging party and the person charged with the violation under this section may enter into a settlement agreement concerning the violation alleged in the charge before any determination is reached by the Secretary under subsection (c). Such an agreement shall be effective unless the Secretary determines, not later than 30 days after the notice of the proposed agreement is received, that the agreement is not generally consistent with the purposes of this title.

##### (c) **INVESTIGATION AND COMPLAINT ON NOTICE OF A CHARGE.**—

(1) **INVESTIGATION.**—Not later than 60 days after the Secretary receives any charge respecting a violation of this title, the Secretary shall investigate the charge and issue a complaint based on the charge or dismiss the charge.

(2) **DISMISSAL.**—If, after conducting an investigation under paragraph (1), the Secretary determines that there is no reasonable basis for the charge that is being investigated, the Secretary shall dismiss the charge and promptly notify the charging party and the respondent as to the dismissal.

(3) **COMPLAINT BASED ON CHARGE.**—If, after conducting an investigation under paragraph (1), the Secretary determines that there is a reasonable basis for the charge, the Secretary shall issue a complaint based on the charge and promptly notify the charging party and the respondent as to the issuance.

(4) **SETTLEMENT WITH SECRETARY.**—On the issuance of a complaint under paragraph (3), the Secretary and the respondent may enter into a settlement agreement concerning a violation alleged in the complaint. Any such settlement shall not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides a full remedy for the charging party.

(5) **CIVIL ACTIONS.**—If, at the end of the 60-day period referred to in paragraph (1), the Secretary—

(A) has not made a determination under paragraph (2) or (3);

(B) has dismissed the charge under paragraph (2); or

(C) has disapproved a settlement agreement under subsection (b)(4) or has not entered into a settlement agreement under paragraph (4) of this subsection;

the charging party may elect to bring a civil action under section 107. Such election shall bar further administrative action by the Secretary with respect to the violation alleged in the charge.

(6) **COMPLAINT AND RELIEF ON INITIATIVE OF SECRETARY.**—

(A) **COMPLAINT.**—The Secretary may issue and serve a complaint alleging a violation of this title on the basis of information and evidence gathered as a result of an investigation initiated by the Secretary pursuant to section 108.

(B) **RELIEF.**—On the issuance of a complaint under subparagraph (A), the Secretary may petition the United States district court for the district in which the violation is alleged to have occurred, or in which the respondent resides or transacts business, for appropriate temporary relief or a restraining order. On the filing of any such petition, the court shall cause notice of the petition to be served on the respondent, and the court shall have jurisdiction to grant to the Secretary such temporary relief or restraining order as the court determines just and proper.

(d) **RIGHTS OF PARTIES.**—

(1) **SERVICE OF COMPLAINT.**—In any case in which a complaint is issued under subsection (c), the Secretary shall, not later than 10 days after the date on which the complaint is issued, cause to be served on the respondent a copy of the complaint.

(2) **PARTIES TO COMPLAINT.**—Any person filing a charge alleging a violation of this title may elect to be a party to any complaint filed by the Secretary alleging such violation. Such election must be made prior to the commencement of a hearing.

(3) **CIVIL ACTION.**—The failure of the Secretary to comply in a timely manner with any obligation assigned to the Secretary under this title shall entitle the charging party to elect, at the time of such failure, to bring a civil action under section 107.

(e) **CONDUCT OF HEARING.**—

(1) **PROSECUTION BY SECRETARY.**—The Secretary shall have the duty to prosecute any complaint issued under subsection (c).

(2) **HEARING.**—An administrative law judge shall conduct a hearing on the record with respect to any complaint issued under this title. The hearing shall be commenced not later

than 60 days after the issuance of such complaint, unless the judge, in the discretion of the judge, determines that the purposes of this Act would best be furthered by commencement of the action after the expiration of such period.

(f) FINDINGS AND CONCLUSIONS.—

(1) IN GENERAL.—After a hearing conducted under this section, the administrative law judge shall promptly make findings of fact and conclusions of law, and, if appropriate, issue an order for relief as provided in section 109.

(2) NOTIFICATION CONCERNING DELAY.—The administrative law judge shall inform the parties, in writing, of the reason for any delay in making such findings and conclusions if such findings and conclusions are not made within 60 days after the conclusion of such hearing.

(g) FINALITY OF DECISION; REVIEW.—

(1) FINALITY.—The decision and order of the administrative law judge under this section shall become the final decision and order of the Secretary unless, on appeal by an aggrieved party taken not later than 30 days after the entry of the order, the Secretary modifies or vacates the decision, in which case the decision of the Secretary shall be the final decision.

(2) REVIEW.—Not later than 60 days after the entry of the final order of the Secretary under paragraph (1), any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

(3) JURISDICTION.—On the filing of the record of an order under this subsection with the court, the jurisdiction of the court shall be exclusive and the judgment of the court shall be final, except that the judgment shall be subject to review by the Supreme Court of the United States on writ of certiorari or certification as provided in section 1254 of title 28, United States Code.

(h) COURT ENFORCEMENT OF ADMINISTRATIVE ORDERS.—

(1) POWER OF SECRETARY.—If an order of the Secretary is not appealed under subsection (g)(2), the Secretary may petition the United States district court for the district in which the violation is alleged to have occurred, or in which the respondent resides or transacts business, for the enforcement of the order of the Secretary, by filing in such court a written petition praying that such order be enforced.

(2) JURISDICTION.—On the filing of a petition under paragraph (1), the court shall have jurisdiction to make and enter a decree enforcing the order of the Secretary. In such a proceeding, the order of the Secretary shall not be subject to review.

(3) DECREE OF ENFORCEMENT.—If, on appeal of an order under subsection (g)(2), the United States court of appeals does not reverse or modify such order, such court shall have the jurisdiction to make and enter a decree enforcing the order of the Secretary.

SEC. 107. ENFORCEMENT BY CIVIL ACTION.

(a) RIGHT TO BRING CIVIL ACTION.—

(1) **IN GENERAL.**—Subject to the limitations contained in this section, an eligible employee or any person, including a class or organization on behalf of any eligible employee, or the Secretary may bring a civil action against any employer (including any State employer) to enforce the provisions of this title in any appropriate court of the United States or in any State court of competent jurisdiction.

(2) **NO CHARGE FILED.**—Subject to paragraph (3), a civil action may be commenced under this subsection without regard to whether a charge has been filed under section 106(b).

(3) **LIMITATIONS.**—No civil action may be commenced under paragraph (1) if the Secretary—

(A) has approved a settlement agreement or has failed to disapprove a settlement agreement under section 106(b)(4) or 106(c)(4), as appropriate, if such action is based on a violation alleged in the charge and resolved by the agreement; or

(B) has issued a complaint under section 106(c)(3) or 106(c)(6), if such action is based upon a violation alleged in the complaint.

(4) **ENFORCEMENT OF SETTLEMENT AGREEMENTS.**—Notwithstanding paragraph (3)(A), a civil action may be commenced to enforce the terms of any such settlement agreement.

(5) **TIMING OF COMMENCEMENT OF CIVIL ACTION.**—

(A) **IN GENERAL.**—Except as provided in subparagraph (B), no civil action may be commenced later than 1 year after the date of the last event that constitutes the alleged violation.

(B) **EXCEPTION.**—In any case in which—

(i) a timely charge is filed under section 106(b); and

(ii) the failure of the Secretary to issue a complaint or enter into a settlement agreement based on the charge (as provided under section 106(c)(4)) occurs later than 11 months after the date on which any alleged violation occurred;

the charging party may commence a civil action not later than 60 days after the date of such failure.

(6) **AGENCIES.**—The Secretary shall not bring a civil action against any agency of the United States.

(7) **EXCLUSIVE JURISDICTION ON COMPLAINT.**—On the filing of a complaint with the court under this subsection, the jurisdiction of the court shall be exclusive.

(b) **VENUE.**—An action brought under subsection (a) in a district court of the United States may be brought—

(1) in any appropriate judicial district under section 1391 of title 28, United States Code; or

(2) in the judicial district in the State in which—

(A) the employment records relevant to such violation are maintained and administered; or

(B) the aggrieved person worked or would have worked but for the alleged violation.

(c) **NOTIFICATION OF THE SECRETARY; RIGHT TO INTERVENE.**—A copy of the complaint in any action by an eligible employee under subsection (a) shall be served on the Secretary by certified mail.

The Secretary shall have the right to intervene in a civil action brought by an employee under subsection (a).

(d) **ATTORNEYS FOR THE SECRETARY.**—In any civil action under subsection (a), attorneys appointed by the Secretary may appear for and represent the Secretary, except that the Attorney General and the Solicitor General shall conduct any litigation in the Supreme Court.

#### SEC. 108. INVESTIGATIVE AUTHORITY.

(a) **IN GENERAL.**—To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) **OBLIGATION TO KEEP AND PRESERVE RECORDS.**—Any employer shall keep and preserve records in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) **REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS.**—The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to section 106.

(d) **SUBPOENA POWERS, ETC.**—For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

#### SEC. 109. RELIEF.

##### (a) **INJUNCTIVE RELIEF.**—

(1) **CEASE AND DESIST.**—On finding a violation under section 106, the administrative law judge shall issue an order requiring such person to cease and desist from any act or practice that violates this title.

(2) **INJUNCTIONS.**—In any civil action brought under section 107, the court may grant as relief against any employer (including any State employer) any permanent or temporary injunction, temporary restraining order, or other equitable relief as the court determines appropriate.

##### (b) **MONETARY DAMAGES.**—

(1) **IN GENERAL.**—Any employer (including any State employer) that violates any provision of this title shall be liable to the injured party in an amount equal to—

(A) any wages, salary, employment benefits, or other compensation denied or lost to such eligible employee by reason of the violation, plus interest on the total monetary damages calculated at the prevailing rate; and

(B) an additional amount equal to the greater of—

(i) the amount determined under subparagraph (A), as liquidated damages; or

(ii) consequential damages, not to exceed 3 times the amount determined under such subparagraph.

(2) **GOOD FAITH.**—If an employer who has violated this title proves to the satisfaction of the administrative law judge or the court that the act or omission that violated this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this title, such judge or the court may, in the discretion of the judge or court, reduce the amount of the liability provided for under this subsection to the amount determined under paragraph (1)(A).

(c) **ATTORNEY'S FEES.**—A prevailing party in an action described under this section (other than the United States) may be awarded a reasonable attorney's fee as part of the costs, in addition to any relief awarded. The United States shall be liable for costs in the same manner as a private person.

(d) **LIMITATION.**—Damages awarded under subsection (b) shall not accrue from a date that is earlier than 2 years prior to the date on which a charge is filed under section 106(b) or a civil action is brought under section 107.

#### **SEC. 110. SPECIAL RULES CONCERNING EMPLOYEES OF LOCAL EDUCATIONAL AGENCIES.**

(a) **IN GENERAL.**—Except as otherwise provided in this section, the rights (including the rights under section 104, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this Act shall apply to—

(1) any "local educational agency" (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(12))) and its employees; and

(2) any private elementary and secondary school and its employees.

(b) **LEAVE DOES NOT VIOLATE CERTAIN OTHER FEDERAL LAWS.**—A local educational agency and a private elementary and secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this Act.

(c) **INTERMITTENT LEAVE FOR INSTRUCTIONAL EMPLOYEES.**—

(1) **IN GENERAL.**—Subject to paragraph (2), in any case in which an employee employed principally in an instructional capacity by any such educational agency or school seeks to take leave under subparagraph (C) or (D) of section 102(a)(1) that is foreseeable based on planned medical treatment or supervision and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment or supervision; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

- (i) has equivalent pay and benefits; and
- (ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) APPLICATION.—The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an employee who complies with section 102(e)(2).

(d) RULES APPLICABLE TO PERIODS NEAR THE CONCLUSION OF AN ACADEMIC TERM.—The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any employee employed principally in an instructional capacity by any such educational agency or school:

(1) LEAVE MORE THAN 5 WEEKS PRIOR TO END OF TERM.—If the employee begins leave under section 102 more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) LEAVE LESS THAN 5 WEEKS PRIOR TO END OF TERM.—If the employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) LEAVE LESS THAN 3 WEEKS PRIOR TO END OF TERM.—If the employee begins leave under paragraph (A), (B), or (C) of section 102(a)(1) during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) RESTORATION TO EQUIVALENT EMPLOYMENT POSITION.—For purposes of determinations under section 104(a)(1)(B) (relating to the restoration of an employee to an equivalent position), in the case of a local educational agency or a private elementary and secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) REDUCTION OF THE AMOUNT OF LIABILITY.—If a local educational agency or a private elementary and secondary school that has violated title I proves to the satisfaction of the administrative law judge or the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of such title, such judge or court may, in the discretion of the judge or court, reduce the amount of the liability provided for under section 109(b)(1) to the amount determined under subparagraph (A) of such section.

**SEC. 111. NOTICE.**

(a) **IN GENERAL.**—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) **PENALTY.**—Any employer that willfully violates this section shall be assessed a civil money penalty not to exceed \$100 for each separate offense.

**SEC. 112. REGULATIONS.**

Not later than 60 days after the date of enactment of this title, the Secretary shall prescribe such regulations as are necessary to carry out this title (including regulations under section 106(a)).

## **TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES**

**SEC. 201. LEAVE REQUIREMENT.****(a) CIVIL SERVICE EMPLOYEES.—**

(1) **IN GENERAL.**—Chapter 63 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

### **“SUBCHAPTER V—FAMILY LEAVE**

**“§ 6381. Definitions**

“For purposes of this subchapter:

“(1) The term ‘employee’ means—

“(A) an ‘employee’, as defined by section 6301(2) of this title (excluding an individual employed by the Government of the District of Columbia); and

“(B) an individual described in clause (v) or (ix) of such section;

who has been employed for at least 12 months and completed at least 1,000 hours of service during the previous 12-month period.

“(2) The term ‘serious health condition’ means an illness, injury, impairment, or physical or mental condition that involves—

“(A) inpatient care in a hospital, hospice, or residential medical care facility; or

“(B) continuing treatment, or continuing supervision, by a health care provider.

“(3) The term ‘son or daughter’ means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

“(A) under 18 years of age; or

“(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

"(4) The term 'parent' means the biological parent of the child or an individual who stood in loco parentis to a child when the child was a son or daughter.

**"§ 6382. Leave requirement**

"(a)(1) An employee shall be entitled, subject to section 6383, to 12 workweeks of leave during any 12-month period—

"(A) because of the birth of a son or daughter of the employee;

"(B) because of the placement of a son or daughter with the employee for adoption or foster care;

"(C) in order to care for the son, daughter, spouse, or parent of the employee who has a serious health condition; or

"(D) because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

"(2) The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

"(3) Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employing agency agree otherwise. Leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary, subject to subsection (e).

"(b) On agreement between the employing agency and the employee, leave under this section may be taken on a reduced leave schedule. Such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled under this section.

"(c) Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

"(d)(1) If an employing agency provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title may be provided without compensation.

"(2)(A) An employee may elect, or an employing agency may require the employee, to substitute for leave under subparagraph (A), (B), or (C) of subsection (a)(1) any of the accrued paid vacation leave, personal leave, or family leave of the employee for any part of the 12-week period of such leave under such paragraph.

"(B) An employee may elect, or an employing agency may require the employee, to substitute for leave under paragraph (1)(D) of subsection (a) any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for any part of the 12-week period of such leave under such paragraph, except that nothing in this Act shall require an employing agency to provide paid sick leave or paid medical leave in any situation in which such employing agency would not normally provide any such paid leave.

"(e)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or adoption, the employee shall provide the employ-

ing agency with prior notice of such expected birth or adoption in a manner that is reasonable and practicable.

“(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment or supervision, the employee—

“(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse or parent of the employee; and

“(B) shall provide the employing agency with prior notice of the treatment or supervision in a manner that is reasonable and practicable.

### “§ 6383. Certification

“(a) An employing agency may require that a claim for leave under subparagraph (C) or (D) of section 6382(a)(1), be supported by certification issued by the health care provider of the employee or of the son, daughter, spouse, or parent of the employer, as appropriate. The employee shall provide a copy of such certification to the employing agency.

“(b) A certification under subsection (a) shall be sufficient if it states—

“(1) the date on which the serious health condition commenced;

“(2) the probable duration of the condition;

“(3) the appropriate medical facts within the knowledge of the provider regarding the condition; and

“(4)(A) for purposes of leave under section 6382(a)(1)(C), an estimate of the amount of time that the eligible employee is needed to care for the son, daughter, spouse, or parent; and

“(B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the employee’s position.

“(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 6382(a)(1), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning any information certified under subsection (b) for such leave.

“(2) Any health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employing agency.

“(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).

“(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be

final and shall be binding on the employing agency and the employee.

"(e) The employing agency may require that the employee obtain subsequent recertifications on a reasonable basis.

#### **"§ 6384. Job protection**

"(a) Any employee who takes leave under section 6382 for the intended purpose of the leave shall be entitled, upon return from such leave—

"(1) to be restored by the employing agency to the position of employment held by the employee when the leave commenced; or

"(2) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

"(b) The taking of leave under section 6382 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

"(c) Nothing in this section shall be construed to entitle any restored employee to—

"(1) the accrual of any seniority or employment benefits during any period of leave; or

"(2) any right, benefit, or position of employment other than that to which the employee was entitled to on the date the leave was commenced.

"(d) As a condition to restoration under subsection (a), the employing agency may have a policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work.

"(e) Nothing in this section shall be construed to prohibit an employing agency from requiring an employee on leave under section 6382 to periodically report to the employing agency on the status and intention of the employee to return to work.

#### **"§ 6385. Prohibition of coercion**

"(a) An employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of the rights of the employee under this subchapter.

"(b) For the purpose of this section, 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation).

#### **"§ 6386. Health insurance**

"An employee enrolled in a health benefits plan under chapter 89 who is placed in a leave status under section 6382 may elect to continue the health benefits enrollment of the employee while in leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909) through the employing agency of the employee, the appropriate employee contributions.

### “§ 6387. Regulations

“The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1991.”

(2) TABLE OF CONTENTS.—The table of contents for chapter 63 of title 5, United States Code, is amended by adding at the end thereof the following:

#### “SUBCHAPTER V—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE

“6381. Definitions.

“6382. Leave requirement.

“6383. Certification.

“6384. Job protection.

“6385. Prohibition of coercion.

“6386. Health insurance.

“6387. Regulations.”.

(b) EMPLOYEES PAID FROM NONAPPROPRIATED FUNDS.—Section 2105(c)(1) of title 5, United States Code, is amended by striking out “53” and inserting in lieu thereof “53, subchapter V of chapter 63,”.

## TITLE III—COMMISSION ON LEAVE

### SEC. 301. ESTABLISHMENT.

There is established a commission to be known as the Commission on Leave (hereinafter referred to in this title as the “Commission”).

### SEC. 302. DUTIES.

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed policies relating to leave;

(B) the potential costs, benefits, and impact on productivity of such policies on employers; and

(C) alternative and equivalent State enforcement of this Act with respect to employees described in section 110(a); and

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report that may include legislative recommendations concerning coverage of businesses that employ fewer than 50 employees and alternative and equivalent State enforcement of this Act with respect to employees described in section 110(a).

### SEC. 303. MEMBERSHIP.

(a) COMPOSITION.—

(1) APPOINTMENTS.—The Commission shall be composed of 12 voting members and 2 ex officio members to be appointed not later than 60 days after the date of the enactment of this Act as follows:

(A) **SENATORS.**—One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) **MEMBERS OF HOUSE OF REPRESENTATIVES.**—One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) **ADDITIONAL MEMBERS.**—

(i) **APPOINTMENT.**—Two Members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) **EXPERTISE.**—Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor-management issues and shall include representatives of employers.

(2) **EX OFFICIO MEMBERS.**—The Secretary of Health and Human Services and the Secretary of Labor shall serve on the Commission as nonvoting ex officio members.

(b) **VACANCIES.**—Any vacancy on the Commission shall be filled in the manner in which the original appointment was made.

(c) **CHAIRPERSON AND VICE CHAIRPERSON.**—The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) **QUORUM.**—Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

#### **SEC. 304. COMPENSATION.**

(a) **PAY.**—Members of the Commission shall serve without compensation.

(b) **TRAVEL EXPENSES.**—Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5, United States Code, when performing duties of the Commission.

#### **SEC. 305. POWERS.**

(a) **MEETINGS.**—The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) **HEARINGS AND SESSIONS.**—The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) **ACCESS TO INFORMATION.**—The Commission may secure directly from any Federal agency information necessary to enable it to carry out this Act. On the request of the chairperson or vice chair-

person of the Commission, the head of such agency shall furnish such information to the Commission.

(d) **EXECUTIVE DIRECTOR.**—The Commission may appoint an Executive Director from the personnel of any Federal agency to assist the Commission in carrying out the duties of the Commission.

(e) **USE OF FACILITIES AND SERVICES.**—Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(f) **PERSONNEL FROM OTHER AGENCIES.**—On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to assist the Commission in carrying out the duties of the Commission.

#### **SEC. 306. TERMINATION.**

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

## **TITLE IV—MISCELLANEOUS PROVISIONS**

#### **SEC. 401. EFFECT ON OTHER LAWS.**

(a) **FEDERAL AND STATE ANTI-DISCRIMINATION LAWS.**—Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) **STATE AND LOCAL LAWS.**—Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State and local law that provides greater employee leave rights than the rights established under this Act or any amendment made by this Act.

#### **SEC. 402. EFFECT ON EXISTING EMPLOYMENT BENEFITS.**

(a) **MORE PROTECTIVE.**—Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights provided under this Act or any amendment made by this Act.

(b) **LESS PROTECTIVE.**—The rights provided to employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

#### **SEC. 403. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.**

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

#### **SEC. 404. COVERAGE OF THE SENATE.**

##### **(a) COVERAGE.—**

(1) **APPLICATION.**—The rights and protections established under sections 101 through 105 shall apply with respect to a Senate employee and an employing authority of the Senate.

(2) **DEFINITIONS.**—For purposes of the application described in paragraph (1)—

(A) the term “eligible employee” means a Senate employee; and

(B) the term “employer” means an employing authority of the Senate.

(b) **INVESTIGATION AND ADJUDICATION OF CLAIMS.**—All claims raised by any individual with respect to Senate employment, pursuant to sections 101 through 105, shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(c) **RIGHTS OF EMPLOYEES.**—The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under sections 101 through 105.

(d) **APPLICABLE REMEDIES.**—When assigning remedies to individuals found to have a valid claim under sections 101 through 105, the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent practicable apply the same remedies applicable to all other employees covered by such sections. Such remedies shall apply exclusively.

(e) **EXERCISE OF RULEMAKING POWER.**—Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in subsection (a) shall be within the exclusive jurisdiction of the United States Senate. The provisions of subsections (b), (c), and (d) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

#### **SEC. 405. REGULATIONS.**

The Secretary of Labor shall prescribe such regulations as are necessary to carry out sections 401 through 403 not later than 60 days after the date of the enactment of this Act.

#### **SEC. 406. EFFECTIVE DATES.**

(a) **TITLE III.**—Title III shall take effect on the date of the enactment of this Act.

(b) **OTHER TITLES.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), titles I and II and this title shall take effect 6 months after the date of the enactment of this Act.

(2) **COLLECTIVE BARGAINING AGREEMENTS.**—In the case of a collective bargaining agreement in effect on the effective date prescribed by paragraph (1), title I shall apply on the earlier of—

(A) the date of the termination of such agreement; or

(B) the date that occurs 12 months after the date of the enactment of this Act.

## **II. SUMMARY OF THE BILL**

S. 5, the Family and Medical Leave Act of 1991, makes available to employees up to 12 weeks of unpaid leave per year under particular circumstances that are critical to the life of a family. An

employee may take leave: 1) upon the birth of the employee's child, 2) upon the placement for adoption or foster care of a child with the employee, 3) when an employee needs to care for his or her child, spouse or parent who has a serious health condition, or 4) when an employee is unable to perform the functions of his or her position because of a serious health condition.

The Act exempts small businesses and covers employees who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. To be eligible for leave, an employee must be employed by that employer for 12 months and not less than 1000 hours. The Act covers 5 percent of U.S. employers and 40 percent of U.S. employees.

An employee is entitled to 12 weeks of unpaid family leave during any 12-month period upon the birth, placement for adoption or foster care of the employee's son or daughter or to care for a child, spouse, or parent of the employee who has a serious health condition, or because of a serious health condition that makes the employee unable to perform the functions of his or her job. The employer may elect to substitute any of the employee's accrued paid leave for any part of the 12-week leave period. When the need for leave is foreseeable, the employee must provide reasonable prior notice, and make efforts to schedule leave so as not to disrupt unduly the employer's operations. An employer may also require an employee to report periodically during the leave period on the employee's leave status and intention to return to work. Spouses employed by the same employer are entitled to a total of 12 weeks of leave for the birth or adoption of a child or for the care of a sick parent.

An employer may require medical certification to support a claim for leave for an employee's own serious health condition or to care for a seriously-ill child, spouse or parent. For the employee's own medical leave, the certification must include a statement that the employee is unable to perform the functions of his or her position. For leave to care for a seriously ill child, spouse or parent, the certification must include an estimate of the amount of time the employee is needed to care for the child or parent. An employer may require a second medical opinion and periodic recertifications at its own expense. If the first and second opinions differ, the employer, again at its own expense, may require the binding opinion of a third health care provider, approved jointly by the employee and the employer.

During leave, the employee's pre-existing health benefits are maintained. The employer is under no obligation to accrue seniority or other employment benefits during the leave period. Upon return from leave, the employee shall be restored to the same or an equivalent position. The taking of leave shall not result in the loss of any benefit earned before the leave nor shall it entitle the employee to any right or benefit other than that to which the employee was entitled on the date the leave commenced.

It is unlawful for any employer to interfere with or deny the exercise of any right provided under this Act.

The Act will be enforced by the Department of Labor. Any person alleging a violation of the Act may file a charge with the Secretary of Labor and, if necessary, receive an Administrative

Law judge ruling. The administrative ruling may be appealed to the U.S. Court of Appeals. A charging party may also bring a civil action in United States district court, unless the Secretary previously has approved a settlement agreement or issued a complaint. Relief in the event of a violation may include actual monetary damages and an additional amount equal to the actual monetary damages or consequential damages.

Title II of the Act extends coverage of the Act to federal civil service employees.

Title III establishes a bipartisan Commission on Leave with the purpose of conducting a comprehensive study of existing and proposed policies relating to leave and the potential benefits and costs of such policies for employers. The Commission will report its findings to Congress within 2 years of the date on which the Commission first meets.

Nothing in this Act shall be construed to affect any federal or state law prohibiting discrimination or any state or local law which provides greater family or medical leave rights than those established under this Act. The Act shall not be construed to diminish an employer's obligations under a collective bargaining agreement; nor may the rights provided under this Act be diminished by such an agreement. Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than those required in the Act.

The Act is based not only in the Commerce Clause, but also on the guarantee of equal protection and due process embodied in the Fourteenth Amendment.

The Act generally shall take effect 6 months after the date of enactment, except for Title III (the Commission) which shall take effect immediately. In the case of a collective bargaining agreement, the Act shall become effective upon termination of the agreement, but no later than 12 months after the date of enactment.

The rights and protections established by the Act apply to Senate employees. Any claims raised are to be investigated and adjudicated by the Select Committee on Ethics.

### III. BACKGROUND AND NEED FOR LEGISLATION

#### INTRODUCTION

The purpose of the Family and Medical Leave Act of 1991 is to assist workers in balancing the demands of the workplace with the needs of their families. The legislation simply provides workers with a limited period of job protection and continued health insurance coverage while they meet pressing family obligations related to the birth, adoption, or the health condition of a child or the serious health condition of a parent or a spouse, or a worker's own serious health condition. This legislation is essential if the nation is to address the dramatic changes that have occurred in the American workforce in recent years.

The demographic revolution in the workforce is having a profound effect on the lives of working men and women and their families. The once-typical American family, where the father worked for pay and the mother stayed at home with the children, is vanishing. Today less than ten percent of American families fits this

mode. The majority of American families are comprised of two-earner couples working outside the home.

Today, more than one-half of all mothers with infants under one year of age work outside the home. That figure has doubled since 1970, and the rate of increase shows no sign of abating. At present, women constitute forty-five percent of the workforce. Fifty-seven percent of American women are now in the work force, 80 percent of whom are in their prime childbearing years. According to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home. The mothers of 24 million children are working outside the home. By the year 2000, about three out of every four American children will have mothers in the workforce.

Women are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than \$18,000 a year. Women are the sole parent in 16 percent of all families. In March 1988, there were approximately 13 million children living in more than 7.7 million single-parent families, about one-fourth of all American children. Nearly 6.7 million of these families were headed by mothers. The new economic reality is that today's families depend on a woman's income to survive.

While these work force changes have been a boon to American business, many American workers face difficult choices every day as they seek to balance family and workplace responsibilities. Presently, one-third of the 7 million people providing unpaid care for the elderly are in the work force—37 percent take care of their parents—and more than half of the 45.4 million children in two-parent families have both parents in the work force. For too many American families, family crises such as the urgent need to care for an ill child or elderly parent present an untenable choice; millions of workers are denied the temporary leave necessary to meet their family obligations without losing their jobs in the process.

In addition to addressing the needs of American workers, this legislation will have a positive effect on the employers who upgrade their policies to conform with the national standard for family and medical leave. Based on the experiences of employers with such leave, the employers that institute leave will gain economically from higher employee productivity, retention of trained staff, and improved ability to attract qualified employees. Such gains can be expected to far outweigh the modest cost of continued health insurance estimated to cost approximately \$5.30 per covered employee annually, based on General Accounting Office studies.

The United States is the only industrialized country with no national family leave policy. As surveys by Dr. Sheila Kamerman of Columbia University and by the International Labor Organization have documented, almost every country in the world has a national parental leave requirement, including our most successful economic competitors in Western Europe and Asia. Other nations typically have requirements which go beyond 5 in terms of leave duration and income replacement. In Europe, 5 to 6 months of paid leave is the norm for new mothers. Even Japan, often behind European nations in terms of labor standards, provides 12 to 14 weeks of partially paid leave with full job guarantees.

## THE NEED FOR FAMILY AND MEDICAL LEAVE

The Subcommittee on Children, Family, Drugs and Alcoholism conducted eight hearings during the 100th and 101st Congresses on similar family and medical leave legislation. In addition, the Subcommittee conducted a hearing on January 24, 1991 on S. 5. There, the need for family and medical leave and the effects of family leave on business were explored in further detail. At this hearing and at the eight Subcommittee hearings held in 1987, 1988, and 1989, witnesses testified on the difficulties they faced in attempting to meet the needs of their families and the demands of their jobs. Their experiences provide a human dimension on the need for a national policy on family and medical leave.

### *Childbirth and adoption*

Many new parents have no guarantee that their jobs will be protected either when they are unable to work due to pregnancy, childbirth, or related medical conditions, or after childbirth or placement for adoption or foster care when they need to stay home to care for their infants. The Family and Medical Leave Act would address this problem in two ways. First, its provision of temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy- and childbirth-related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition). Second, its provision of family leave would ensure that new parents do not lose their jobs for a period to care for their infants.

The Committee heard testimony from several witnesses who had suffered because their employers did not have such policies. In Atlanta, Ms. Beverly Wilkinson told the Subcommittee of losing her job when she gave birth to her first child. For five years she had worked as a secretary for an Atlanta corporation that described itself as a "family oriented company". When her child was born, she took two weeks of vacation time and five weeks of maternity leave as permitted by the company policy. The week before she was due back for work, she received a call telling her that her job had been eliminated due to a departmental re-organization. In spite of her record of good performance reviews and her ability to perform other jobs at the large company, she was not offered another position.

Similarly, a television anchor from Portland, Oregon told the Subcommittee of being forced to choose between her job and her newborn child. Ms. Rebecca Webb initially had an agreement with her employer for a three-month leave after childbirth. However, seven months into her pregnancy, the leave previously granted was rescinded. The company claimed that they did not want to set a precedent for maternity leave because there were four other pregnant women working at the time. With the maternity leave no longer available, Ms. Webb was forced to quit her job.

At the hearing on January 24, 1991, Ms. Carmen Maya told of losing her job at a hospital where she had worked nineteen years as a pharmacy technician. Special arrangements for her Down's syndrome child and her own medical complications meant that she

needed twelve weeks of leave. However, as she prepared to return to her job, her supervisor called to tell her that her job was no longer open. She told the Committee,

I'm still shocked at my sudden plunge from economic self-sufficiency to dependence, all because I needed time off for family and medical needs. Basically, it has been a nightmare. I'm used to bringing home a paycheck. But because I lost my job, I had to stand in welfare lines to get food for my children.

The experiences of Ms. Wilkinson, Ms. Webb and Ms. Maya are not atypical. In Atlanta, an advocacy organization for women office workers, Nine to Five, runs a job problem counseling hot line that receives approximately 100 calls per year from women who have been fired, harassed or forced out of jobs due to conditions related to pregnancy or maternity leave. As Atlanta Nine to Five director Cindia Cameron testified, "For most of these women, compassion is all that we have to offer. There is no federal agency and no lawyer to refer them to for help in getting their job, their income or their family stability back."

In the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings. According to a 1988 study directed by Roberta M. Spalter-Roth and Heidi Hartman of the Institute for Women's Policy Research, by the year after birth, the earnings of mothers were \$1.40 an hour lower than those of women who did not give birth (although they had been higher before birth). The researchers attribute much of this earnings loss to the lack of job protection for the new mothers. As a result, this nation loses \$715 million each year in foregone earnings and additional public assistance costs. Elder care also results in substantial earnings loss and increased public assistance costs. The cost of elder care is estimated at \$4.8 billion annually in lost income (mostly to women) and \$37.9 million in public assistance payments to those caregivers unable to work due to their caregiving responsibilities for elderly dependents.

Adoptive parents also face difficulties in the absence of a reasonable family leave policy. Most adoption agencies require the presence of a parent in the home—some for as long as four months—when a child is placed with the family to allow them adequate time for proper bonding. When Ms. Catherine Hodge, a teacher in Los Angeles, adopted a child, she was only allowed one month of leave by her employer. She told the Subcommittee that more time would have been very helpful, especially in view of the boy's many physical and mental disabilities, and the difficulties she had in establishing a stable environment and integrating him into his new life. More time at the beginning, as well as a clear policy for later flare-ups of the child's illness, would have eased the difficulties that Ms. Hodge's family experienced in dealing with four hospitalizations and with arrangements for special education classes and other assistance for the boy in school. Without a family leave policy, both her company and her son suffered.

In his testimony, Mr. Joe Kroll of the North American Council on Adoptable Children stressed the need for job security during the important period of adjustment after the adoption of a special

needs (or any) child. He stated that "Prospective adoptive parents will be more able to consider special needs adoptions if they know they are not jeopardizing their jobs in the process. Thus, in exchange for job security, adoptive parents volunteer to love and care for a child who has been abandoned or neglected, and for whom the state would otherwise be responsible."

These many personal accounts of the importance of family leave are corroborated by experts in the fields of child development and pediatrics. Dr. Ed Zigler, Director of the Yale Bush Center on Child Development and Social Policy and former director of the Office of Child Development Policy at the then U.S. Department of Health, Education, and Welfare, testified in strong support of the legislation. The Yale Bush Center has convened a distinguished advisory committee to direct a two-year study of our nation's infant care situation and to evaluate the impact of the changing composition of the workforce on families with infants. The committee was particularly concerned about low-income working parents and parents with premature, disabled or severely-ill infants. The committee's primary recommendation was for an infant care policy that would allow employees an adequate period of time for parents to care for newborn or newly-adopted infants and for mothers to recover from pregnancy and child birth. Based on the committee's findings, as well as his thirty years of work on policies related to children and families, Dr. Zigler told the Subcommittee "While I do not feel this bill goes far enough, it is an absolutely necessary first step. \* \* \* Parental leave is critical to the healthy development of children and families."

Another world-recognized specialist in early childhood development, Dr. T. Berry Brazelton, from Harvard University and Children's Hospital in Boston, also stressed the importance of infant-parent bonding during the first few months of a child's life. He urged that at least one parent have the opportunity to care for a newborn in order to create a strong foundation for the child's later development. The early nurturing and attachment enables the parent to instill in the infant a sense of confidence and of being an important person. Dr. Brazelton told the Committee that in the course of speaking with 1500 parents every week, he has learned that most women who return to work too soon after childbirth do so because of their family's need for health insurance benefits.

### *Child's serious illness*

A tragic example of the need for job protection for parents when their children are seriously ill was provided by Mr. Thomas Riley. His son was diagnosed as having cancer when he was four and a half years old. During the illness and extensive treatments, Mr. Riley was hired as a supervisor at a jewelry manufacturing company with the expressed understanding that he would need and receive time to accompany his son to medical treatments. Over the next six months his son's condition deteriorated, and Mr. Riley somehow managed both to care for his son and work at least 50 hours a week. He took a total of six days off from work during this period, all of which were uncompensated. Shortly after his son died, Mr. Riley was fired for no apparent reason, and in spite of his

incredible efforts to give the job everything he could. He spoke for himself and many others in saying:

I have always worked hard for a living, and taken pride in providing for my family. There are millions of American fathers like me. I don't want any, or expect any, special favors from anyone, from my employers or the Government. But I don't think that parents should be forced to choose between caring for their children or keeping their jobs.

Pediatricians also addressed the needs of children who are seriously ill, whose recovery is greatly enhanced by parental care. Dr. Stuart Siegel, head of the Division of Hematology and Oncology at Children's Hospital in Los Angeles, testified that the prospects for long-term survival for children with life-threatening illnesses are much better when the parents are able to assist with the treatment. For example, parents must transport their children to the hospital frequently and be available to the children at home in order to monitor their condition and to administer some of the therapy. Unfortunately, he reported that in caring for over 2,000 children with cancer and serious blood diseases, he has—

Encountered numerous instances where parents had to choose between bringing their child to the hospital for much needed medical treatment and evaluation versus losing their jobs . . . In almost all cases, the employers were aware of the nature and severity of the illness that the parent was dealing with in their child, but nevertheless, the parent was still faced with this terrible choice.

Ms. Dot Holland, the Director of Social Work at Henrietta Egleson Hospital for Children in Atlanta, Georgia, pointed out that most hospitals expect at least one parent to stay in the hospital with a child most of the time. While this rooming-in contributes to the child's recovery, if the working parent with insurance chooses to stay at the hospital and loses his or her job, even when another job is obtained, there may no longer be insurance coverage for a chronically-ill child because of the exclusion of pre-existing conditions. The loss of insurance may in turn force the family to depend on welfare and mark the first step in the cycle of poverty, especially in a single-parent family. Ms. Holland testified that although family and medical leave legislation would not solve all the problems that the parents of their patients face, it will "help many families survive the crisis of a child's serious illness or the birth of a child emotionally intact and financially solvent."

#### *Elder care and spousal care*

Virtually the same policy considerations arise when a worker faces the serious illness of his or her own parent or spouse. The urgent need to deal with the serious illness of the parent often creates a crisis for the worker and the entire family. At this time a stable income, the assurance of a secure job, and the opportunity to take time off when necessary are at a premium for the worker with caregiving responsibilities.

The Subcommittee heard testimony from a worker whose employer was unwilling to provide the needed flexibility. Ms. Myra Guski, a medical technologist, was forced to choose between her dying 76-year old father and her job when her employer refused to grant her request for temporary family leave:

When my father's death was close, I asked my supervisor for a leave of absence. He flatly refused my request. I had no choice but to resign . . . Caring for a loved parent is difficult under the best of circumstances . . . But my parents' need shouldn't have put my job in jeopardy. Had the Family and Medical Leave Act been law in 1983, I would not have been asked to choose between my father and my job.

At the January 24, 1991 hearing, Ms. Sandra Seymour told the Committee of being denied leave when her 82-year-old father suffered two heart attacks in 1988. She generalized from her experience in saying that,

Part of the solution is permitting sons and daughters time to assist in the reorganization of their parents' lives, time to do something other than shove their parents into institutions when it is not necessary, time to investigate what is best when home care is no longer practical. Family and medical leave legislation facilitates such decisions. The little people—the common man—we are too often unable to adjust our work schedules when family emergencies demand our presence. Therefore we must seek support and empathy from state and federal legislators.

Ms. Guski and Ms. Seymour are among the seven million Americans who provide unpaid care for the elderly. Approximately 38 percent of caregivers are taking care of their parents, and 35 percent are caring for their spouses. Three out of every four caregivers are women, and nearly one out of three are poor. For the 95 percent of elderly people not in nursing homes, the most critical factor in preventing or delaying placement is the existence of family care. In 1987, there were 27 million non-institutionalized elderly in the United States, with the elderly population growing faster than the rest of the population. This trend, coupled with the steady increase of women in the work force, foretells even greater need for workplace policies that accommodate caregiving for the worker's parent.

In the absence of a national family leave policy, approximately 11 percent of caregivers presently are forced to quit employment or are fired because of their caregiving responsibilities, according to information provided to the Subcommittee by Dr. Robyn Stone of the National Center for Health Services Research and Health Care Technology Assessment. In addition, a recent survey, conducted for the American Association of Retired Persons and the Travelers' Companies Foundation, found that because of caregiving responsibilities, 38 percent of employed caregivers had to change from full-time to part-time work. According to the same survey, approximately 20 percent of working caregivers had their benefits, including health insurance, reduced.

*Leave for the employee's own serious illness*

In addition to the family leave purposes described above, S. 5 provides for unpaid job protected leave and the continuation of any existing health insurance coverage during an employee's serious illness. The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Medical leave is a necessity for American workers, especially for poor families. The serious threat to the employee's health is difficult enough to deal with alone without adding the prospect of job loss and termination of health insurance at such a time.

The need for medical leave has become even more imperative with the demographic and work force changes described earlier in this report. The number of two-earner families has increased by more than 50 percent since 1966. Two out of three women working outside the home today are either the sole providers for their children or have husbands who earn less than \$18,000 a year. Twenty million workers today are either single heads of household or living alone. The proportion of children in families headed by a single parent has increased from 9 percent in 1960 to 24 percent in 1987. Job loss because of illness has devastating effects on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household. As Eleanor Holmes Norton testified:

For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. Indeed, it is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present system. For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary. The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities.

A compelling example of the harm inflicted when a seriously ill employee is fired was recounted at Congressional hearings by Ms. Frances Wright. Despite 10 years of exemplary service as a retail manager of a clothing store in Virginia, she was fired after developing cancer of the colon. She initially needed approximately 12 weeks off for surgical procedures. Later, although she made every effort to accommodate the employer's needs by scheduling chemotherapy treatments on weekends (keeping work loss to one day), and although she had been absent from work in her ten years with the company only two other times (for a total of three weeks), she was fired. The two year interval before she was finally able to find new work was extremely difficult for her.

Subsequent events in the account of Ms. Wright reveal that companies that have fired workers with serious health conditions are perfectly able to take a more generous approach. When Ms.

Wright's company was taken over by a new owner, she was hired back; and this time, when she had a recurrence of the cancer, she received five weeks of paid leave, and took her leave with the emotional and financial security of knowing her job was not at risk.

In her testimony before the Subcommittee, Ms. Barbara Hoffman, Vice-President of the National Coalition for Cancer Survivorship stressed the need for job protection for cancer patients who face termination due to their medical condition. According to Ms. Hoffman, approximately 25 percent of all cancer survivors, over one million Americans, experience some form of employment discrimination solely because of their cancer history. In a Stanford University study of 400 cancer patients, six percent of the patients were terminated after treatment. Ms. Hoffman stated that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments."

A 1988 study entitled "Unnecessary Losses" confirmed the fact that workers who have been seriously ill suffer greater unemployment and decreased earnings in years following the illness than do other workers. The study, conducted by the Institute for Women's Policy Research, compared the economic circumstances of workers who either experienced or did not experience more than 50 hours of absence from their work because of illness. They found that two years after illness, the "ill" group had significantly lower incomes and hourly wages, were working significantly fewer hours, and suffered more hours of unemployment. The losses for black women and men were the highest. The study concludes that legislation such as S. 5 can be expected to reduce substantially these losses because workers who can go back to their former jobs will suffer less unemployment and earnings loss than they do now.

#### THE EXTENT OF EXISTING FAMILY AND MEDICAL LEAVE POLICIES

There is widespread consensus that the influx of women into the workforce has had a tremendous impact on the family structure. Experts recognize the importance of parental availability during childbirth, adoption or a child's serious illness, and the need for employment policies that recognize family responsibilities. Yet existing family leave policies fall short of meeting the needs of today's workers. While many employers do permit some type of leave under limited circumstances, a large proportion of employers have yet to adopt such policies.

In the case of childbirth, most employers limit their leave policies to the immediate period of physical disability. Many women have access to such maternity-as-disability leave, but the duration and the job protections vary widely, and "bonding" leave for infant care after disability is much more limited. Leave for fathers and for adoption is rarely available, and leave for a child's or elderly parent's serious illness is unusual. A 1988 study by Buck consultants reported that only 16 percent of employers have an ill-child policy and only 14 percent have an ill-parent policy. Whether or not health insurance coverage is continued during leave varies widely from employer to employer.

Because there is no single body of research that documents exactly how many employers provide the job security and continuation of health benefits that would be required by this legislation, the picture of existing policies must be pieced together from various sources. A 1986 study by the U.S. Chamber of Commerce found that only 50 percent of the 700 firms surveyed had either a parental or disability leave plan. Of the firms with leave plans, only 31 percent routinely granted eight weeks or more of leave and most (57 percent) required employees to pay for continuation of their health benefits at this critical time. Only 33 percent of the firms with leave guaranteed workers the same or a similar job upon returning to work.

Many studies overstate the prevalence of parental leave policies because they focus on larger and self-selected employers. Even so, they confirm that leave is often limited to childbirth-related physical disability for women (distinct from infant care leave). Catalyst, a national non-profit research organization, conducted a survey of the policies of Fortune 1500 companies and issued its "Report on a National Study of Parental Leaves" in 1986. Catalyst found that some job-protected infant care leave (distinct from disability leave) was offered to women at 51.8 percent of the responding companies. By contrast, only 37 percent of these companies extended parental leave rights to fathers and often on a more limited basis than to mothers, and only 27.5 percent of the respondents offered benefits to workers who adopt children.

A 1988 study for the Connecticut Task Force on Work and Family Roles refined the questions and therefore the results even further. Carefully distinguishing between maternity-as-disability leave and infant care leave, the study found that less than 10 percent of all firms provide infant care leave. For firms with fewer than 100 employees, less than 5 percent provide leave for infant care.

A recent study on leave was conducted by the Bureau of Labor Statistics and was issued in June, 1990. The BLS survey finds that 37 percent of employees working in private businesses with more than 100 employees are provided "maternity leave" and 18 percent are covered by unpaid "paternity leave". Such leave is defined in the study as leave to care for a newborn child and does not include other kinds of leave such as leave for short-term disabilities and paid vacation, which also might be used for this purpose. The survey provides representative 1989 data for thirty-one million workers in private nonagricultural establishments with 100 or more employees.

Although many employers already recognize the value of job protection during illness, a significant proportion of workers do not have sick leave. A study by the Bureau of Labor Statistics, reported in 1989, found that 32 percent of workers had no sick leave. This was consistent with the 1991 study commissioned by the U.S. Small Business Administration which found that 30 to 40 percent of firms with more than 50 employees did not provide job-guaranteed sick leave. For workers without sick leave, S. 5 will ensure job protection where there is none; even for those who do have some sick leave, S. 5 may provide greater protection. Given the prevalence of leave, compliance with S. 5 should not require major adjustments

by employers, while providing much needed assistance to employees whose jobs and health insurance are otherwise at risk. The Committee views this legislation as ultimately reducing the individual, family, employer, and societal costs of serious health conditions.

Another significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

In analyzing surveys on the availability of leave, it is critical to distinguish between a policy that provides job-guaranteed leave to all workers, as opposed to a case-by-case approach where an employer may or may not grant leave when requested. A recent study commissioned by the U.S. Small Business Administration found that the majority of employers currently offer some type of leave for use during periods when employees are unable to work because of sickness or disability. However, only "1 percent of the sample offer non-discretionary unpaid sick leaves of specified length, where the firm also provides job and seniority guarantees and health benefit continuation." The study also found that seventy to ninety percent of firms offer leave only of variable or unspecified length. It went on to observe that "[s]uch leave offer little security to employees if employers do not guarantee some minimum length of leave."

Some critics of the legislation have argued that the bill is unnecessary because employers will use cafeteria benefit plans voluntarily to provide family leave. However, there is no evidence that the flexible or cafeteria benefits approach will lead to greater availability of family leave. Very few workers are covered by flexible benefits plans. According to the Bureau of Labor Statistics, in 1989 only nine percent of full-time employees at medium and large firms were eligible for flexible or cafeteria benefits.

Such plans rarely encompass parental leave. Unpaid leave is not even reported in the benefit survey literature as a component of cafeteria plans. At the Subcommittee hearing on February 2, 1989, Ms. Dana Friedman, formerly with the Conference Board and now Co-President of the Families and Work Institute, addressed the question of cafeteria plans. Based on her consulting with employers and on inquiries placed to major benefits companies, she testified that she knew of no companies which offer family leave as part of a cafeteria plan. Even short-term disability plans (generally analogous to the provisions of S. 5 for an employee's own illness) were offered by only 12 percent of respondents to the 1986 Hewitt Survey on Flexible Benefits. Thus, when offered, family and medical leave is typically a core benefit to which all employees are entitled, not a variable option in a cafeteria plan. Based on available evidence, the Committee therefore concludes that there is little

direct relationship between flexible benefit plans and family and temporary medical leave.

Finally, there are indications that the availability and scope of current family leave policies are severely limited for those in lower paying jobs. This is compounded by the reality that these workers have fewer resources available to deal with family crises. A 1987 study by the National Council of Jewish Women found that management and professional employees were more likely to receive employer contributions to health insurance during maternity disability leave than were blue collar workers. Similarly, a 1989 Bureau of Labor Statistics survey found that lower-wage workers had less access to sick leave than higher-paid workers: 56 percent of production workers had no sick leave, by contrast with 7 percent of professional and administrative workers.

#### IMPACT ON EMPLOYERS

Because of the small business exemption for employers with fewer than 50 employees, only five percent of employers are covered by this legislation. The Committee hopes that the legislation will establish a norm that all employers will try to match to attract and retain good employees.

For those employers providing family and medical leave, all indications are that the policy functions effectively and has little, if any, net cost. Their positive experiences serve as a road map for those not yet providing family and medical leave. In the Catalyst study, 86 percent of respondents said that setting up a leave period and arranging for the continuation of benefits was relatively easy to do. The work of any leave-taker was handled primarily by re-routing it to others or, less frequently, by using a temporary replacement from inside or outside the company.

A nationwide survey of business executives commissioned by the U.S. Small Business Administration found that the costs of permanently replacing an employee are on average significantly greater than those of granting a worker's request for leave. The study found that the costs to employers of terminations due to pregnancy, childbirth, illness, or disability vary from \$1131 to \$3152 per termination. The study also determined that the average cost to employers of granting workers' requests for leave varies from 97 cents per week to \$97.78 per week. The study concluded that the "net cost to employers of placing workers on leave is always substantially smaller than the cost of terminating an employee."

The Subcommittee received testimony from a wide range of employers that provide family and medical leave. Many of the witnesses testified in dual capacities, as small employers providing leave and as experts in other areas relevant to the legislation. From this testimony the Committee concludes that family and medical leave is beneficial for both the employee and the employer. Mr. Geoffrey Carter, a small business owner, affirmed this conclusion in his testimony at the February 2, 1989 Subcommittee hearing:

It has been my experience that the best policy is to provide the necessary leave and to plan accordingly. This is accomplished by spreading the workload and supporting

the temporary leave with temporary employees. The cost of this alternative is short term, and the benefits of this policy command the respect and loyalty of all our employees.

At the January 24, 1991 hearing, Mr. Lawrence Perlman, President and Chief Executive Officer of Control Data Corporation drew on the experiences of his company and argued that a national standard for leave will help individual businesses and the economy as a whole.

. . . the Family and Medical Leave Act is a modest and timely response to unprecedented demographic and cultural shifts in the nature of the American workforce. Over the years, enlightened and successful businesses have demonstrated the wisdom and value of family and medical leave policies. Our experiences show that this is an area where a federal minimum standard can, at relatively little cost, make a very real difference to workers . . . It can also work to bolster the economy by reducing turnover among experienced, trained employees and above all foster an environment among corporate and community leaders that nurtures children and family members.

Mr. David Warfield, Vice President of the Board of Trustees of Huntington Beach Union High School in California reviewed three decades of positive experience with leave in their school system:

Over the past 30 years the district has had an average of four employees taking advantage of the maternity/adoption leave and/or utilizing paid sick leave benefits, less than 1 percent of the staff . . . . The district has experienced no major problems or hardships in conducting school business while employees were on maternity leave. The services of qualified substitutes have always been available so that the education of our young people has not been interrupted and the day-to-day functioning of the district has not suffered any detriment. The district has always cooperated in granting maternity/adoption leaves and including maternity disability under paid sick leave benefits because it has been the philosophy of the district to hire and retain the best qualified employees.

Ms. Jeanne Kardos, Director of Employee Benefits for the Southern New England Telephone company (SNET), summarized the company's ten years of experience with parental and medical leave. Leave policies at SNET include general medical leave, infant care leave for mothers and fathers (after the period of disability for mothers of newborns), leave for adoption, for a child's serious illness, and continuation of health insurance. Ms. Kardos testified that the leave policies are considered an asset by management and workers alike.

We recognize that women with small children are in our workforce to stay . . . These women are very highly trained. They have a tremendous amount of job experience, and we do not want to lose them. They have a spe-

cial need that we have recognized. The need is parenting . . . We also have a very selfish reason. We regard these people as assets to the corporation. We have a lot invested in them . . . We think by having these kinds of benefit plans, we can attract the best people and keep them. . . We think it is cost-effective rather than costly . . . [because] it serves productivity. We get people back who are not only highly trained and skilled in what they do, but we get them in such a way that they are very grateful to the company that cares for them, and they stay with us. Our average service in our company is very long.

Ms. Kardos' testimony is consistent with the findings of the 1986 Chamber of Commerce survey in which the most often cited reason for offering parental leave benefits was recruitment and retention (61 percent).

The General Accounting Office has done cost projections for family and medical leave bills introduced in the 100th and 101st Congresses with provisions very similar to those of S. 5. The GAO used existing employer practices to project the impact of this legislation on employers without family leave policies. According to the GAO's analysis, federal family and medical leave legislation will have no measurable effect on workplace routines or productivity. After an intensive survey of 80 firms with leave policies in two metropolitan labor markets, GAO found that only 30 percent of workers are replaced. Instead, just as the Catalyst study found, employers tend to reallocate the work of those on leave to other employees. GAO also found that the cost of replacement workers is generally similar to or less than the cost of the worker replaced, and employers believe the replacement does not result in a significant loss of output. Based upon this survey, GAO estimated that the legislation will result in fewer than 1 in 275 workers being absent from work at any one time.

Thus, the GAO concluded "[T]here will be little, if any measurable net costs to employers associated with a firm's method of adjusting to workers taking leave under this proposal." The cost of this legislation results exclusively from the continuation of health insurance for employees on unpaid leave. The total cost of legislation requiring employers with 20 or more employees to provide 10 weeks of family leave and 13 weeks of medical leave was projected as \$236 million in 1989, or about \$4.30 per covered employee. Adjusting the GAO estimate for the higher 50-employee threshold and the 12-week leave period in S. 5 and for increases in health insurance costs, the Committee estimates that the annual cost of S. 5 is approximately \$5.30 per covered employee.

Some critics of S. 5 have argued that its implementation will result in employers' taking away other employee benefits. Such a benefit tradeoff is improbable in view of the low cost of unpaid family leave as compared to the typical fringe benefits package. For example, in 1989, members of the Chamber of Commerce reported average expenditures of \$10,750 per employee for benefits (not including legally required benefits payments). To determine actual experience under similar circumstances, the Subcommittee invited the Commissioner of the Oregon Bureau of Labor and In-

dustries to testify at the February 2, 1989, hearing about the state's experience with recently enacted family leave legislation. In preparation for her testimony, Commissioner Mary Wendy Roberts contacted employers throughout the state and found that none of them had reduced other benefits when they came into compliance with the statutory family leave requirements. At the same hearing, Ms. Dana Friedman testified that in her extensive consulting with companies on the family leave policies, "there was absolutely no indication that there was a plan to cut back on other benefits".

To the contrary, employers are consistently positive about the effect of family leave on productivity, turnover, and training costs. It should come as no surprise, then, that at the Subcommittee's February 2, 1989 hearing, a top official of the major national business lobbying organization opposed to S. 5 could not name a single business or corporation which had reduced or eliminated other employee benefits when a voluntary or state-required family leave program was put in place.

Perhaps the best guidance concerning the impact of proposed federal legislation is the experience of states that have enacted similar legislation recently. The Families and Work Institute asked employers to assess the impact of family leave statutes in Minnesota, Oregon, Rhode Island, and Wisconsin. Presenting findings at the January 24, 1991 hearing, Co-President Ellen Galinsky testified that sizable majorities of the employers reported that the state laws were neither costly nor burdensome to implement. For example, 88-95% reported that the state laws were not difficult to implement; 88-94% reported that the leave laws had not forced them to provide fewer health benefits; and 66-73% reported that the laws had not resulted in an increase in health benefit costs. Similarly, 56-84% reported no change in unemployment insurance costs; 74-77% reported no change in training costs; and 56-66% reported no change in administrative costs. The states have served as laboratories, and the Committee expects the impact of federal legislation to be consistent with their experiences.

#### FEDERAL AND STATE RESPONSES

Absent passage of this legislation, employee rights to leave are established only through the Pregnancy Discrimination Act of 1978 (PDA) and state statutes.

The PDA amended Title VII of the 1964 Civil Rights Act to classify pregnancy and childbirth as temporary disabilities and to require that women receive the same health insurance coverage, income and job protection as employees who incur other disabilities. In states where disability insurance is mandatory (New York, New Jersey, Rhode Island, California, Hawaii and Puerto Rico), pregnancy-related disabilities are covered by disability insurance, thus providing wage replacement though not a job guarantee. Many employers changed their maternity leave policies in the wake of PDA, developing standardized policies that treated the maternity disability period consistently with other disabilities. The PDA expanded the rights of pregnant women to childbirth-related disability leave, but it imposed no requirement on employers to provide leave in the first place.

A number of states have statutes covering elements of the family and medical leave provided by S. 5. Five states and the District of Columbia have family and medical leave laws: Connecticut, District of Columbia, Maine, Pennsylvania (state employees only), Rhode Island, and Wisconsin. Seven states have family leave laws providing job protection for care of family members: Minnesota, New Jersey, North Dakota (state employees only), Oklahoma (state employees only), Oregon, Washington and West Virginia (state employees only). Ten states (California, Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Hampshire, Tennessee, Vermont) and Puerto Rico provide for pregnancy disability leave through statutes or through regulations issued pursuant to state anti-discrimination laws. Florida and North Carolina have pregnancy disability leave requirements for state employees only.

Even with the trend to enact state policies to help working parents, the vast majority of American workers are not covered by such legislation. In addition, a federal standard would avoid the inconsistencies created by differing state statutes. Currently, the right to job protection related to pregnancy and childbirth could be a "reasonable period of time" or six weeks or four months, depending on the state in which the mother works. The present system is a patchwork of widely divergent laws, creating serious confusion and costs for interstate employers. This inefficiency would end with a minimum national standard.

An important dimension of the proposed Federal legislation is the breadth of its coverage. The bill will provide no incentive to discriminate against women or against younger or older workers because it addresses the leave needs of workers who are young and old, male and female, married and single. The legislation is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

#### CONCLUSION

Because of profound demographic changes, a national standard for family and medical leave has become imperative. Existing employer policies and state statutes do not meet the needs of workers for job protection during periods of conflicting work and family demands. When a new child arrives, when a family member is ill, when an employee is temporarily disabled, the employee has no choice—she or he must be absent from work. Lower-income employees, who have the fewest resources to cushion the financial loss of absence from work, are most in need of job-protected leave and most in need of government's assurance that they can get it.

The Committee believes that this Act accomplishes the goal of assisting families with their dual responsibilities in a way that is fair to employers and employees alike. This legislation puts into place a national policy that is fair and equitable, as well as economically sound.

## IV. HISTORY OF LEGISLATION

## LEGISLATIVE ACTION IN THE 102ND CONGRESS

On January 14, 1991, Senator Christopher J. Dodd introduced S. 5, the Family and Medical Leave Act of 1991, a bill to entitle employees to unpaid leave in cases involving the birth, or adoption of an employee's child or the serious health condition of an employee or of the child, spouse or parent of an employee. Employers with 50 or more employees are covered by the legislation. The bill was referred to the Committee on Labor and Human Resources.

A hearing was conducted by the Subcommittee on Children, Family, Drugs and Alcoholism on January 24, 1991.

On April 24, 1991, the Committee on Labor and Human Resources ordered S. 5, as amended, favorably reported. The Committee approved the bill as amended by a roll call vote of 12-5.

## HEARING

A hearing on S. 5 was held by the Subcommittee on Children, Family, Drugs and Alcoholism of the Committee on Labor and Human Resources, on January 24, 1991. The following individuals provided testimony:

Dr. T. Berry Brazelton, Professor Emeritus, Harvard University, Cambridge, Massachusetts;

The Most Reverend James W. Malone, Chairman, Committee on Domestic Social Policy, United States Catholic Conference, Youngstown, Ohio;

Mr. Lawrence Perlman, President and Chief Executive Officer, Control Data Corporation, Minneapolis, Minnesota;

Ms. Carmen Maya, Chicago, Illinois;

Ms. Sandra Seymour, Menomonee Falls, Wisconsin;

Ms. Barbara Blum, President Adams National Bank, Washington, D.C.;

Dr. Ellen Galinsky, Co-President, Families and Work Institute, New York, New York;

Mr. William R. Mattox, Jr., Director of Policy Analysis, Family Research Council, Washington, D.C.;

Ms. Merle Alvis, S.P.H.R., Babcock and Wilcox Company (testifying on behalf of Society for Human Resources Management), Lynchburg, Virginia.

## V. COMMITTEE VIEWS

*Leave provided under the bill*

The bill provides up to twelve weeks of leave per year incident to the birth or placement for adoption or foster care of a child. Leave may also be taken in order to care for a child, a dependent son or daughter over the age of eighteen, a spouse or a parent who has a serious health condition. Finally, leave is available for an employee who, because of a serious health condition is unable to perform the functions of his or her position.

The phrase "to care for", in section 102(a)(1)(C), is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a

seriously ill child than others not so closely tied to the child. In some cases there is no one else other than the child's parents who could care for the child. The same is often true for adult children caring for a seriously ill parent or spouse. Employees are thus assured the right to a period of leave to attend to their child's, spouse's or parent's basic needs, both during periods of inpatient care and during periods of home care, when such child, spouse or parent has a serious health condition.

A father, as well as a mother, can take family leave because of the birth or serious health condition of his child; a son as well as a daughter is eligible for leave to care for a parent. Such leave can generally be taken at the same time, on an overlapping basis, or sequentially, as long as it is taken "because of" one of the circumstances specified in section 102(a). Section 102 makes it possible, among other things, for a father to take leave during his wife's childbirth and recovery, an especially crucial time, whether the wife is a homemaker or an employee on temporary medical leave. More generally, it permits families to choose which parent will attend to extraordinary family responsibilities in light of the family's preferences, needs, career concerns, and economic considerations.

In the case of a placement for adoption or foster care, under section 102(a)(1)(B), leave may be taken upon the actual arrival of a child or may begin prior to arrival if an absence from work is required for such a placement to proceed.

Section 102(a)(2) states that entitlement to leave under 102(a)(1)(A) and (B) expires 12 months after the birth or adoption of the child.

The terms "son or daughter" and "parent" in section 102 must be read in light of the definitions of those terms in sections 101(8) and 101(13) of the bill. Many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, the people who care for children and who therefore find themselves in need of workplace accommodation for their child-care responsibilities are the child's adoptive, step, or foster parents, or their guardians, or sometimes simply their grandparent or other relative or adult. This legislation deals with such families by tying the availability of leave to the birth, adoption, or serious health condition of a "son or daughter," and then defining the term "son or daughter" to mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis . . ." (Sec. 101(13)). In choosing this definitional language, the Committee intends that the terms "son or daughter" and "parent" be broadly construed to ensure that the employees who actually have the day-to-day responsibility for caring for a "son or daughter" or who have a biological or legal relationship to that "son or daughter" are entitled to leave.

An employee also is eligible for family leave to care for a son or daughter over 18 years of age if he or she has a serious health condition and is "incapable of self-care because of a mental or physical disability." (Sec. 101(13)(B)). The bill recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care does not end when he or she reaches 18 years of age. In such circumstances, parents continue to have an

active role in caring for their sons or daughters over eighteen years of age. A dependent adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition. The nature of the son or daughter's serious health condition which would warrant leave under this provision would be similar to those warranting leave to care for sons and daughters under 18 years of age and parents.

Section 102(a)(1)(C) also provides for leave to care for an employee's parent or spouse who has a serious health condition. Under this provision, an employee could take leave to care for a parent or spouse of any age who, because of a serious mental or physical condition, is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent or spouse whose daily living activities are impaired by such conditions as advanced Alzheimer's disease, stroke, severe clinical depression or who is recovering from major surgery or is in the final stages of a terminal illness.

Section 102(a)(1)(C) grants family leave to an employee for the care of a child, spouse, or parent who has a "serious health condition," a term defined in section 101(12). Section 102(a)(3) provides that leave taken in connection with a serious health condition under subparagraphs (C) and (D) may be taken "intermittently when medically necessary, subject to subsection (e)". Subsection (e) requires, that where the need for leave is foreseeable, the employee provide the employer with prior notice "in a manner which is reasonable and practicable," (102(e)(1)) and that, when reasonable, health treatment and supervision be scheduled so as not to disrupt unduly the operations of the employer. (102(e)(2)).

Family leave may be taken on a reduced leave basis if agreed to by the employee and employer as set forth in section 102(b). Any reduced leave schedule agreed to shall not result in a reduction in the total amount of leave to which an employee is entitled. A "reduced leave schedule" is defined as "leave scheduled for fewer than the usual number of hours per workweek, or hours per workday, of an employee". (Sec. 101(10)).

The availability of reduced leave is crucial in some circumstances if the purposes of family leave are to be fulfilled. The leave provided by this bill is unpaid. It is therefore, as a practical matter, unavailable to those families who simply cannot afford unpaid leave even for a short time. If the choice is between full-time leave and no leave at all, these families might be denied the important benefits of the leave. Reduced leave permits these families to experience some of the benefits of the bill while maintaining economic self-sufficiency. The Committee anticipates that reduced leave will often be perceived as desirable by employers who would often prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave rather than hire a full-time temporary replacement.

Section 102(d) provides for the substitution of various types of paid leaves for the unpaid leave required by this legislation. This provision clarifies that where an employer has a paid family or medical leave policy, the remainder of the statutory period of 12 weeks

may be unpaid. In all instances of leave under 102(a)(1), an eligible employee may elect—or an employer may require—the employee to take paid vacation or personal leave for any part of the leave required under the Act. For leave under 102(a)(1)(A), (B) and (C), section 102(d)(1)(A) allows substitution of paid “family leave” for any part of the leave required under those paragraphs. The term “family leave” is used here to refer to paid leave provided by the employer covering the same circumstances as covered by section 102(a)(1)(A), (B) and (C). Section 102(d)(2)(B) allows substitution of paid medical or sick leave for any part of the leave required under 102(a)(1)(D). As stated in section 102(d)(2)(B), nothing in the Act requires an employer to provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.

The purpose of 102(d) is to ensure that analogous paid leaves may be substituted for the unpaid leave under the Act in order to credit the employer for existing leave policies and to mitigate the financial impact on employees of wage loss due to family and temporary medical leave. The employer may not trade shorter periods of paid leave for the longer periods prescribed by the Act. Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the Act, on an unpaid basis.

Section 102(f), provides a limitation on the right to take family leave when both spouses are employed by the same employer. Under section 102(f), if both parents are employed by the same employer, the amount of leave that the parents may together take is limited to 12 weeks if they are taking leave under 102(a)(1)–(A) or (B) or leave to care for a sick parent under 102(a)(1)(C). This provision is intended to ensure that employers are not discouraged from hiring married couples.

Leave under section 102 is provided to an “eligible employee”. Section 101(2)(A) defines “eligible employee” as “any employee as defined in section 3(e) of the Fair Labor Standards Act of 1938”, provided that the employee meets the minimum length of service requirements in section 101(2)(A). This definition is broadly inclusive, as section 3(e) of the Fair Labor Standards Act [FLSA] defines “employee” as “any individual employed by an employer”. This includes individuals employed by public agencies such as the U.S. Postal Service, the U.S. Postal Rate Commission, individuals employed by a State, including the District of Columbia, or individuals covered by the Railway Labor Act.

Under section 101(2)(A) (i) and (ii), leave under section 102 is provided to employees who have worked for their employer for at least twelve months and for at least one thousand hours during the previous twelve month period. The requirement for minimum hours of service is also meant to be construed broadly. The determining factor in meeting the minimum hours of service rule is the numbers of hours an employee is in service to the employer and is not to be limited by methods of record keeping that do not reflect all the hours an employee is in service to the employer. Employees should not be excluded from the bill’s coverage simply because of a particular industry’s method of tracking hours of work.

For example, the bill under normal circumstances should cover flight attendants or pilots who work at least half-time according to normal industry standards. Flight attendants and pilots are often credited and paid only for those hours actually spent in the air, and not for hours spent on the ground in preparation for their in-flight duties. A flight attendant or pilot who does not accrue 1000 hours of flight time would be covered by the bill if such an employee is "on the job" for more than 1000 hours a year or if such employee works half the normal number of hours worked by an employee working full time in the industry.

Section 101(2)(B)(ii) refers to a worksite with less than 50 employees. The employees at such a worksite are not covered by the bill if the total number of those employed by the employer within 75 miles of the worksite is less than 50. In aggregating the number of employees at the worksite and within the 75 miles, all employees, not just eligible employees, are to be counted.

### *Meaning of Serious Health Condition*

The definition of "serious health condition" in section 101(12) is broad and intended to cover various types of physical and mental conditions. The policies and interpretations discussed in connection with a "serious health condition" apply to both 102(a)(1) (C) and (D).

With respect to an employee, the term "serious health condition" is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. With respect to a child, spouse or parent, the term "serious health condition" is intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities.

The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into "serious health conditions" will be covered by the Act. It is intended that in any case where there is doubt whether coverage is provided by this Act, the general tests set forth in this paragraph shall be determinative. Of course, nothing in the Act is intended or may be construed to modify or affect any law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or handicapped status, as section 401 clarifies.

Examples of serious health conditions include, but are not limited to, heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complica-

tions or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital; the patient also must be absent from work for more than a few days. Someone who has suffered a serious industrial accident may require initial lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter. A cancer patient may need to have periodic chemotherapy or radiation treatments, and a patient with severe arthritis may require periodic treatment such as physical therapy.

A pregnant patient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth, and is under medical supervision requiring additional time off during the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery or other complications develop.

All of these health conditions require recurring absences from work, of more than a few days, either for the condition or operation itself or for continuing medical treatment or supervision (e.g., physical therapy for accident victims or severe arthritis patients). Because continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor, section 102(a)(3) specifically permits an employee to take the leave covered by 102(a)(1)(C) and (D) "intermittently when medically necessary." Only the time actually taken is charged against the employee's entitlement.

Section 102(e) of the bill accommodates employer needs in "any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision", by requiring the employee to make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the employer's operations (subject to the approval of the employee's doctor or other health care provider). In addition, it gives the employer prior notice of the treatment or supervision in a manner which is reasonable and practicable. By "reasonable and practicable", the Committee intends for the employee to give notice in a timely manner and in sufficient time for an employer to make suitable arrangements for the employee's leave so as to avoid undue disruption to the employer.

Section 102(e) also clarifies that the section 102(a)(1)(D) requirement concerning the employee's inability to perform his or her job functions due to a serious health condition contemplates inability caused either by the underlying condition or by the need to receive medical treatment or supervision for it. Someone requiring treatment or supervision that can be scheduled to accommodate the employer's convenience obviously may not have a condition which at

the time of making the scheduling decision prevents the employee from performing the functions of the job (i.e., someone who needs a hernia operation or prenatal care or has early cancer). However, such an employee does need medical treatment or supervision and must at some point be absent from work to receive it, and hence is, at the time of receiving treatment or supervision, "unable to perform the functions of such employee's position."

A narrower construction of the operative language of section 102, under which leave would be available only when the employee literally was so physically or mentally incapacitated that he or she could not work, would deny protection for leaves needed in order for treatment or medical supervision essential to avoid or to recover from such an incapacity. Such a narrow construction is contrary to common sense and would seriously undermine the purposes of the bill.

Another provision designed to accommodate employer needs is found in section 103, concerning certification of the serious health condition. This provision is designed as a check against employee abuse of leave under 102(a)(1)(C) and (D). The employer may require the employee to provide certification by the employee's own health care provider.

Section 103(d) provides that if the employer has reason to question the original certification, the employer may, at its own expense, require a second certification from a different health care provider chosen by the employer. Such a health care provider may not be employed by the employer on a regular basis. Section 103(d) provides for the resolution of conflicts between first and second medical opinions. Under this section an employer may, at its own expense, require a third opinion from a provider jointly designated or approved by the employer and the employee. The third opinion will be considered final and binding.

The certification shall, when possible, be provided in advance or at the commencement of the leave. If the need for leave does not allow for this, such certification should be provided reasonably soon after the commencement of the leave. Under section 103(f) the employer may require reasonable periodic recertifications.

The required content of the certification parallels those already in general use by insurers and is to include the date on which the condition began, its probable duration, and the medical facts concerning the condition. In cases of medical leave, the certification must also state that the employee is unable to perform the functions of his or her position. In cases of family leave to care for a seriously ill child, spouse or parent, the certification shall also contain an estimate of the amount of time the employee is needed to care for the child, spouse or parent.

#### *Employment and benefits protection*

An employee taking leave under this bill is "entitled, on return from such leave," to restoration to his or her previous position or "an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." (Sec. 104.) This provision is central to the entitlement provided in this bill. The right to restoration extends until the expiration of the leave period.

The Committee recognizes that it will not always be possible for an employer to restore an employee to the precise position held before taking leave. On the other hand, employees would be greatly deterred from taking leave without the assurance that they will be reinstated to a genuinely equivalent position upon return from leave. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held. First, the standard of "equivalence" (not merely "comparability" or "similarity") necessarily requires a correspondence to the terms and conditions of an employee's previous position. Second, the standard encompasses all "terms and conditions" of employment, not just those specified. This standard for evaluating job equivalence under section 104(a)(1)(B) parallels Title VII's standard for evaluating job discrimination in 42 U.S.C. sec. 2000e-2(a)(1), which prohibits "discriminat[ion] with respect to [an employee's] compensation, terms, conditions, or privileges of employment." For purposes of job equivalence, the Committee intends that the statutory language contained in section 104(a)(1)(B) of this Act shall be interpreted as broadly as similar language in section 703(a)(1) of Title VII.

Section 104(a)(2) makes explicit that an employer may not deprive an employee who takes leave of benefits accrued before the date on which the leave commenced. Section 104(a)(3)(A) states that nothing in section 104(a) should be construed to entitle a restored employee to the accrual of any seniority or employment benefits during any period of leave. Section 104(a)(3)(B) states that nothing in section 104(a) should be construed to entitle a restored employee to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave. This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred.

Section 104(a)(4) provides that it is permissible for an employer to have a formal company policy which requires all employees to obtain medical certification from the employee's health care provider that the employee is able to resume work, except that nothing in section 104(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employee taking leave under section 102(a)(1)(D)." This language is in the bill to clarify that section 104(a)(4) was not meant to supersede other valid state or local laws that, for reasons of public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a state law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public. The term "valid state or local law" makes it explicit that such state or local laws must not be inconsistent with any federal law such as the Pregnancy Discrimination Act, the Rehabilitation Act, the Americans with Disabilities Act and other provisions of the Family and Medical Leave Act. Section 104(a)(4) is in no way to be construed as allowing states to under-

mine the rights established under these or any other federal law. Nor does this provision affect Section 401 which permits states to enact laws that provide "greater employee family or medical leave rights than the rights established under this Act."

Section 104(b) requires an employer to maintain health insurance benefits during periods of leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date of job restoration. The employer must maintain such coverage under any group health plan. Nothing in this section requires an employer to provide health benefits if it does not already do so at the time the employee commences leave. Section 104(c) is strictly a maintenance of benefits provision. It should be noted, however, that if an employer establishes a health benefits plan during an employee's leave, section 104(c) should be read to mean that the entitlement to health benefits would commence at the same point during the leave that the employee would have become entitled to such benefits if still on the job.

Leave taken under this Act does not constitute a qualifying event (as defined in section 603(2) of the Employee Retirement Income Security Act of 1974) under the continuation of health benefit provisions contained in Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272). However, a qualifying event may occur when it becomes known that an employee is not returning to employment and therefore ceases to qualify for health benefits under this Act.

#### *Maintenance of health benefits under multiemployer plans*

Section 104(b) of the bill requires an employer to maintain coverage for the employee under any group health plan for the limited duration of the employee's leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously from the date the employee commenced the leave until the date the employee is restored or, if earlier, the date on which his or her employment would have terminated. In the case of an employer that contributes to a multiemployer health plan (i.e., a health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements), this requirement means that the employer of the employee taking leave must continue contributing to the plan on behalf of the employee for the duration of the leave, as if the employee had continued in employment throughout the period of leave, unless the plan expressly provides for some other method of maintaining coverage for a period of leave required by the bill. The employee's benefit rights shall continue to be governed by the terms of the plan.

An employer may be obligated to contribute to a multiemployer health plan on behalf of its employees pursuant to a collective bargaining or other agreement, the terms of a plan, or a duty imposed by labor-management relations law. In any event, the Committee's intent is that where the method of providing group health plan coverage is through contributions to a multiemployer plan, the employer, unless the plan expressly provides otherwise, shall be obli-

gated to continue contributing as if the employee were not on leave, notwithstanding any terms of any collective bargaining or other agreement to the contrary, and the employee shall look to the plan for his or her benefit rights.

The Committee recognizes that multiemployer plans need to receive contributions to finance benefit coverage. To ensure that a plan receives employer contributions, the obligation to contribute imposed by the bill, like other statutory obligations imposed by current law, shall be considered an obligation enforceable under 29 U.S.C. Sec. 1145 (relating to delinquent contributions to a multiemployer plan). This is not intended to preclude any other means of enforcement that the plan may provide or be entitled to pursue, but to vest a plan with an absolute right to invoke section 1145.

During the period of leave, the employer shall make contributions to the plan at the same rate and in the same amount as if the employees were continuously employed. Unless the contrary is clearly demonstrated by the employer (or by the plan, where appropriate), it shall be assumed that the employee would have continued working on the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave. So, for example, if the employee normally worked 160 hours a month before taking leave and the employer is obligated to contribute to a multiemployer health plan at the rate of \$1.25 an hour, the employer would be obligated to continue contributing to the plan on behalf of the employee during the leave period at the rate of \$1.25 an hour for 160 hours a month, unless the employer clearly shows that the employee would have worked fewer hours, or the plan clearly shows that employee would have worked more hours, had he or she not been on leave.

A plan may adopt more specific rules governing an employer's contribution obligation during the leave period. For example, a plan may adopt a rule that an employee's normal number of work hours a month is the average number of work hours a month over the month (or a period of months) immediately prior to the employee's leave period. A plan could adopt rules which accommodate its particular reporting period (e.g., monthly, weekly). Also, the Committee intends that an employer shall provide the plan with whatever information is appropriate to assist the plan in determining an employee's status and whether the employer has an obligation to contribute on behalf of the employee.

The bill does not give an employee on leave any greater rights or benefits under a multiemployer plan than an employee who is not on such leave. The same conditions of coverage shall apply to an employee on such leave as apply to an employee who is not on such leave from the employer. This includes any obligations and conditions with respect to employee contributions.

And, of course, these obligations apply only with respect to an "eligible employee" within the meaning of section 101(3) of the bill; that is, an employee who has met the length of employment standard. Neither the employer nor the multiemployer plan has any obligation under the bill with respect to persons who are not "eligible employees."

### *Prohibited acts*

Section 105(a)(2) makes it unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title. This "opposition" clause is derived from section 704(a) of Title VII of the Civil Rights Act of 1964 (which provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this title") and should be given the same interpretation.

For example, the Supreme Court has indicated in dicta that Title VII's opposition clause "forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973)).

The Equal Employment Opportunity Commission (EEOC) has identified a number of examples of "opposition" protected by section 704(a) of the Civil Rights Act: filing or threatening to file a complaint; complaining to anyone (including management, unions, other employees, or newspapers) about allegedly unlawful practices; participating in a group that opposes discrimination; refusing to obey an order because the worker thinks it is unlawful under the Act; opposing unlawful acts by persons other than the employer—e.g., former employers, unions, and coworkers. (EEOC Compliance Manual sec. 492). Section 105(a)(2) of the Family and Medical Leave Act is intended to provide the same types of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA.

Section 105(b) further states that it is unlawful for an employer to discharge or in any other manner discriminate against an employee because such employee has filed a charge, has instituted a proceeding under or related to the bill, has given or is about to give information in connection with any inquiry or proceeding relating to a right provided under this bill or has testified or is about to testify in any inquiry or proceeding relating to a right provided under this bill.

### *Administrative and Civil Enforcement*

The bill contains an enforcement scheme designed to provide the most readily available and timely enforcement system possible. Timely enforcement is essential because of the time-specific nature of the rights provided by the bill. The leave provisions are time-specific in two important respects: first, by the duration of the leave once granted, and second, if not granted in a timely manner the right is effectively lost. Because of the importance of timely enforcement, it is the Committee's intent that all time requirements set forth in the bill be met, and that every effort be made to act expeditiously in resolving these cases.

The Act's enforcement mechanisms include administrative investigation and hearings containing strict deadlines, alternative judicial enforcement, and the imposition of significant remedies for noncompliance. The availability of an administrative scheme means that aggrieved employees will have access to an already ex-

isting Department of Labor structure to investigate and prosecute their claims. At the same time, the imposition of strict time deadlines for action will avoid many of the problems of delay and inaction that often plague administrative enforcement.

While the enforcement deadlines are an important part of the enforcement scheme and the Committee fully intends that they be met, failure to meet a specified time period cannot provide a basis of challenging an administrative holding. Failure to meet a deadline should not be construed to taint the results or outcome of such a case.

An individual who believes he or she has been denied rights guaranteed by the Act (including but not limited to restoration to the same or equivalent position following leave, or maintenance of health insurance benefits during the leave), or who has reason to believe that he or she will be denied any such rights, may file a charge with the Department of Labor or may bring a civil action to enforce the provisions of this Act. An administrative charge must be filed within one year of the violation. Charges may be filed on behalf of a person or a class of individuals.

The Secretary of Labor must investigate the charge and make a determination within 60 days. If it is determined there is a reasonable basis for the charge, the Secretary must issue and prosecute a complaint. An on-the-record hearing before an administrative law judge ("ALJ") must begin within 60 days of the issuance of the complaint (unless the ALJ has reason to believe that the purposes of the Act would be best furthered by allowing more time to prepare for a hearing). The ALJ's findings, conclusions, and order for relief must be issued within 60 days of the hearing's end. The ALJ's decision becomes the final agency decision unless appealed and modified by the Secretary. The final agency decision may be reviewed in a federal court of appeals. If no such review is sought, the Secretary may petition the appropriate federal district court for enforcement of the final agency order.

A charging party may elect, before commencement of the hearing, to be a party to any complaint filed by the Secretary. This will allow that party to present evidence and testimony and to participate fully in the subsequent proceedings in the case. Such election does not, however, relieve the Secretary of his or her duty to prosecute the complaint.

At any time between the filing of a charge and the issuance of the ALJ's findings and conclusions, the parties may negotiate and agree to a settlement. Before the issuance of a complaint, any such settlement entered into by the charging party and the charged employer is effective, unless the Secretary determines within 30 days after notice of the settlement, that the settlement is not consistent with the purposes of the bill. After the complaint has been issued, it is the Secretary's duty to prosecute the complaint and, consequently, any settlement agreement will be negotiated between the Secretary and the party charged. Such agreement may not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides a full remedy for the charging party.

If the Secretary has dismissed or failed to take action on a charge within 60 days after filing, the individual who filed the

charge may elect to file an action directly in federal or state court, instead of continuing with the administrative enforcement procedure. An individual may elect to proceed in court if the Secretary, at any point in the administrative procedure, fails to fulfill his or her obligations under the Act.

A civil action may also be commenced without regard to whether a charge has been filed under section 106(b) except as limited by 107(a)(3) (A) and (B). Notwithstanding section 107(a)(3)(A), a civil action may be commenced to enforce the terms of a settlement agreement under section 106(b)(4). Except as provided in section 107(a)(3)(B), no civil action may be commenced more than one year after the date of the last event constituting the alleged violation.

### *Relief*

Section 109 provides for injunctive and monetary relief for violations of the Act. The provision of mandatory money damages serves the dual purposes of (1) ensuring that employees will be recompensed for their actual losses and the pain and suffering in being denied leave and thus having to initiate legal action in order to assert their rights and (2) adding to employers' incentives to comply.

Section 109(b)(1) provides that an employer who violates the Act shall be liable to the injured party for at least twice the value (plus interest) of the wages, salary, employment benefits or other compensation lost because of the violation. In addition, an employer may be liable for additional consequential damages caused by the violation. Under section 109(b)(1)(B), the liability for consequential damages is limited by to a total of twice what the remedy would be if there were no consequential damages. Consequential damages refer to actual losses suffered by the injured party and include any actual expenses resulting from a denial of medical benefits in violation of the provisions of this Act. If an employer can prove that the violation occurred in good faith, the court may limit the employer's liability to actual losses. It is the Committee's intent that the remedies apply to state employees as well, including the right to sue their employers and that the relief authorized in this section be available against state employers to the full extent this is Constitutionally permissible.

Section 109(c) provides that the prevailing party (other than the United States) may be awarded a reasonable attorney's fee as part of the costs, in addition to any relief awarded. Providing for the award of attorney's fees to prevailing parties will ensure both that attorneys will be willing to represent employees to assert their rights under the Act and that employers will be deterred from violating the provisions of the law.

### *Special rules concerning employees of local educational agencies*

Section 110(b) is intended to clarify the relationship of the Family and Medical Leave Act to certain other Federal statutes. The subsection clarifies that simply granting leave under the Act does not in and of itself violate the statutes listed in this section. However, the granting of leave does not relieve a local educational agency from its obligations under such Acts.

The phrase "an employee employed principally in an instructional capacity" under section 110 (c) and (d) is intended to include teachers or other instructional employees whose principal function is directly providing educational services. This would include special education assistants, such as sign language interpreters, whose presence in the classroom is necessary to the educational process. It would not include teacher assistants, cafeteria workers, building service workers, bus drivers, and other primarily non-instructional employees.

Whenever a teacher is required to extend his or her leave under section 110 (c) or (d), such leave would be treated as other leave under the Act, with the same rights to employment and benefits protection contained in section 104.

Reasonable grounds under subsection (f) of section 110 could include such factors as advice of counsel, collective bargaining agreements, as well as compliance with valid state and local laws, the laws referenced in subsection (b) and regulations or policies promulgated by the Department of Labor.

### *Commission on Leave*

Title III of this Act establishes a bipartisan commission, to be known as the Commission on Leave, to conduct a comprehensive study relating to leave policies and the potential costs, benefits, and impact on productivity of such policies on business. The Commission shall report its finding to Congress within two years of its first meeting.

The Commission will be composed of 12 voting members and 2 ex-officio members. The majority and minority leadership of the House of Representatives and the Senate shall each appoint one member of Congress to the Commission and two additional Commission members selected by virtue of their expertise in family, medical and labor-management issues, including small business representatives. The Secretary of Health and Human Resources and the Secretary of Labor shall serve as nonvoting ex-officio members.

### *Miscellaneous*

Title IV of the Act contains miscellaneous provisions concerning the effect of this legislation on other legislation and on existing employment benefits, the encouragement of more generous leave policies, regulations, and effective dates. Section 401(a) provides that nothing in the Act shall be construed to modify or affect in any way any Federal or state law prohibiting discrimination on the basis of race, religion, color, national origin; sex, age or handicapped status. Thus, for example, nothing in this legislation may be read to affect or amend Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000e et seq., as amended by P.L. 95-555, 92 Stat. 2076 (1978).

The bill also is not intended to modify or to affect the Rehabilitation Act of 1973, as amended, or the regulations concerning employment which have been promulgated pursuant to that statute. Thus, the leave provisions of this bill are wholly distinct from the reasonable accommodation obligations of employers who receive Federal financial assistance, who contract with the Federal govern-

ment, or of the Federal government itself. Employees with disabilities who meet essential job requirements may request such accommodations as job restructuring or the modification of equipment under the 1973 Act. See, e.g., 45 C.F.R. Sec. 84.11 et seq. The purpose of the Act is simply to apply the leave provisions of the bill to all employees and employers within its coverage, and not to modify already existing rights and protections.

Section 401(b) makes it clear that state and local laws providing greater leave rights than those provided in S. 5 are not preempted by the bill or any other federal law. This applies to state and local laws in effect at the time of enactment or laws enacted in the future. Thus, for example, state or local laws that provide greater employee coverage, longer leave periods or paid leave, are not preempted by this Act to the extent that they provide leave in a manner more inclusive or more generous than that provided in S. 5.

For example, current Oregon law provides twelve weeks of parental leave for eligible employees who work for employers of 25 or more. Eligible employees employed by firms of 50 or more would, of course, be entitled to twelve weeks of family leave under this Act; however, nothing in this Act supersedes Oregon's provision of parental leave to employees of firms with 25 or more (but fewer than 50) employees. Similarly, Puerto Rico's law providing for half pay to employees temporarily disabled because of pregnancy, childbirth or related medical conditions is not superseded by this Act; the Act requires only that employers of 50 or more make up any difference between the paid disability period and the 12-week period provided under this Act so that employees are entitled to twelve weeks of leave, part paid and part unpaid.

Section 401(b) also clarifies that state family leave laws at least as generous as that provided in S. 5 (including leave laws that provide continuation of health insurance or other benefits, and paid leave), are not pre-empted by ERISA, or any other federal law.

Section 402(a) specifies that employers must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than those provided under the Act. Conversely, section 402(b) makes clear that rights under the Act cannot be taken away by collective bargaining or employer plans.

Finally section 406 sets forth the Act's effective dates. Title III, creating the Commission, goes into effect immediately. Where there is a collective bargaining agreement in effect on the date of enactment, Title I goes into effect on either the date the agreement terminates, or one year after the date of enactment, whichever occurs earlier. Otherwise, the Act goes into effect six months after the date of enactment. The Committee intends that, once the bill is effective, as soon as an employee has worked for the employer for 1000 hours and a year, such employee is eligible for leave under section 102. Thus employees who meet the eligibility requirements of section 101(3)(A) on the effective date of the bill would be entitled to leave starting on the effective date.

## VI. COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, May 10, 1991.

HON. EDWARD M. KENNEDY,  
*Chairman, Committee on Labor and Human Resources, U.S. Senate,*  
*Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 5, the Family and Medical Leave Act of 1991 as ordered reported by the Committee on Labor and Human Resources on April 24, 1991. The estimated costs of Titles I, II, III and V of S. 5 are discussed below. Title IV contains miscellaneous provisions and effective dates that have no budgetary impact.

## TITLE I

Title I of S. 5 would allow a private sector employee up to 12 weeks leave without pay during any 12-month period, because of the birth of a son or daughter. The placement of a child for adoption or foster care with the employee also would entitle the employee to this leave. In addition, an employee could claim this leave to care for a seriously ill son, daughter, spouse or parent. Also, Title I would permit the employee up to 12 workweeks of temporary medical leave in any 12-month period due to a serious health condition preventing the employee from performing the functions of his or her position. Title I would not apply to any employer of less than 50 workers if the total number of employees employed by that employer within 75 miles of that work site is less than 50.

The direct costs of providing this leave would be borne entirely by the private employer. Nevertheless, enactment of this bill would entail additional administrative costs for the Department of Labor (DOL). Costs would vary with the number of claims filed under S. 5. CBO assumes this act would be administered directly by the DOL Wage and Hour Division.

The Wage and Hour Division works to obtain compliance with the minimum wage, overtime, child labor, and other employment standards, and we assume it would administer this act as well. This division handles compliance actions for approximately one million people per year, as well as fulfilling its other administrative duties. The budget for this division currently is about \$90 million annually. Costs would vary not only with the caseload, but also with the manner in which the DOL assures compliance with these provisions. However, the increase is unlikely to be large relative to the current size of the division.

## TITLE II AND TITLE V

Title II and Title V of S. 5 would allow most federal government employees and employees of the Senate up to 12 weeks of leave without pay during any 12-month period, in addition to any other type of leave, for the birth, adoption, or foster care placement of a child or to care for a sick child or parent. Title II and Title V also would entitle an employee to 12 weeks of leave without pay during any 12-month period when the employee is unable to work because

of a serious health condition. In addition, Title II and Title V would guarantee job protection and allow for continuation of life and health insurance for employees who take such leave.

Under current law, there is no comprehensive federal policy on parental and medical leave. The Office of Personnel Management provides guidelines for granting leave for various purposes, but implementation of leave policy is up to the discretion of each employee's supervisor.

Based on information from a number of federal agencies, it appears that employees who currently take leave without pay for purposes encompassed by S. 5 generally take it for periods of time shorter than authorized by the bill. Thus, enactment of this bill would result in more leave without pay for affected federal employees, although there is no basis for predicting how much additional leave would be taken. Whether this would increase agencies' costs depends on whether the agencies hire temporary replacements and what salary and benefits are paid. A General Accounting Office study of private firms' practices indicates that in many cases no temporary replacements are hired. While no comparable information is available regarding federal agencies, we believe that, in aggregate, granting employees leave without pay for extended periods does not result in costs greater than if the employees continued to work—in part because the salaries and benefits of temporary replacements will sometimes be less than those of the permanent employees and in part because sometimes replacements will not be hired. To the extent that agencies have to hire replacement personnel, some additional costs could result from increased recruiting and personnel administration, but we do not expect such costs to be significant.

### TITLE III

Title III of this bill would establish the Commission on Family and Medical Leave to study existing and proposed policies on such leave, and the potential costs, benefits, and impact on productivity of such policies on employers. Travel expenses, per diem allowances, and salary and overhead costs for an executive director and staff also are authorized, although no specific authorization level is stated in the bill. We estimate these costs could be about \$300,000 per year for the two-year life of the Commission. Costs of Title III most likely would begin late in fiscal year 1991 or in 1992, depending on the date of enactment. Titles I, II and V of the bill would take effect six months after the date of enactment, while Title III would become effective upon enactment.

### PAY-AS-YOU-GO

Because the bill does not affect direct spending or receipts, there are no pay-as-you-go implications under the procedures of section 252 of the Budget Enforcement Act of 1990.

### ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS

There are no data available for estimating the cost impact of S. 5 on state and local governments. They would be responsible for any costs associated with providing the leave specified in Title I to their

employees, including employees of public elementary and secondary schools. These costs could vary with the frequency and duration of leave taken, and with the type and number of replacement personnel needed. Moreover, by the end of 1988 five states had enacted their own parental or family leave laws, and at least 14 states have similar legislation pending. Therefore, in these states, S. 5 may have less of an effect on state and local government costs than in those states with no similar legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are James Hearn (226-2860) and Cory Oltman (226-2820).

Sincerely,

ROBERT F. HALE,  
For Robert D. Reischauer, Director.

## VII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVII of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 5 is made:

### A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 5 would regulate every private and public sector employer with 50 or more employees within a 75-mile radius. This number is estimated as approximately 293,000 establishments. Employees who have worked at least one year and 1000 hours for that employer would be eligible for leave under the Act. This number is estimated as approximately 44 million employees. Those not regulated would be all employers with fewer than 50 employees.

### B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS AND BUSINESSES AFFECTED

Individuals will have their jobs protected and their health insurance coverage maintained during the unpaid family and medical leave. The risk of unemployment will be reduced for individuals who, without S. 5, would have lost their jobs. Similarly, those who could have found new jobs only at lower pay rates will maintain their previous rates of pay upon return from leave. According to a recent study by the Institute for Women's Policy Research, employed women who gave birth and do not have family leave lose an estimated \$607 million in earnings annually, much of which will be saved as a result of this bill. Cost savings will also accrue to individuals on leave as a result of their health insurance being maintained.

There is no evidence of economic impact on consumers as a result of S. 5. Costs to consumers cannot be expected to increase or decrease since the additional costs to employers are minimal (based on a 1989 GAO study, estimated as \$5.30 per year per covered employee) and since there is no evidence of greater business losses where state laws require similar family and medical leave.

The 1989 General Accounting Office study of similar legislation concluded that there would be no measurable net costs to business from replacing workers or lost productivity. The GAO study con-

cluded that the cost of family and medical leave legislation to employers would be less than \$236 million annually. This cost results exclusively from the continuation of health insurance coverage for employees on unpaid leave.

#### C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The Committee believes that this legislation has no significant impact on personal privacy. The right of an employer under section 103 to require certification of serious illness is in keeping with practices commonly associated with disability insurance or sick leave programs. Employer abuse of privacy is precluded by the section 105 prohibition against interference with an employee's exercise of his or her rights. In addition, employer use of private information must be consistent with the Privacy Act of 1974 requirement that information collected for one purpose not be disclosed for a different purpose without the individual's consent.

#### D. ADDITIONAL PAPERWORK, TIME AND COSTS

The bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation and enforcement of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the Committee does not believe it will be significant.

### VIII. SECTION-BY-SECTION ANALYSIS

#### *Section 1. Short title; table of contents*

This section designates this Act as the Family and Medical Leave Act of 1991 and sets out the table of contents.

#### *Section 2. Findings and purposes*

Congress finds that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly; parents should be able to participate in early childrearing and the care of their children with serious health conditions; the lack of employment policies to accommodate working parents forces many individuals to choose between job security and parenting; and there is inadequate job security for employees whose serious health conditions temporarily prevent them from working.

The purposes of this Act are to balance the demands of the workplace and the needs of families; to entitle employees to take reasonable leave, for family or medical reasons; and to accommodate the legitimate interests of employers.

#### TITLE I—GENERAL REQUIREMENTS FOR LEAVE

#### *Section 101. Definitions*

This section defines certain terms for purposes of the Act. Those definitions specifically referenced to the Fair Labor Standards Act are to be interpreted similarly under this Act.

**Eligible employee**—means any employee as defined in section 3(e) of the FLSA who is employed by the employer with respect to whom benefits are sought for not less than 12 months and not less

than 1000 hours over the previous 12 month period, except that such term does not include Federal officers or employees covered under Title II of the Act.

**Employer**—means any person engaged in commerce who employs 50 or more employees within a 75-mile radius during 20 or more calendar weeks in the current or preceding calendar year; any successor in interest of an employer; and any public agency defined under section 3(x) of the FLSA.

**Serious health condition**—means an illness, injury, impairment, or physical or mental condition which involves inpatient care in a hospital, hospice, or residential health care facility; or continuing treatment or supervision by a health care provider.

### *Section 102. Leave requirement*

An employee is entitled to 12 weeks of leave during any 12-month period; because of the birth, placement for adoption or foster care of a child; in order to care for an employee's son, daughter, spouse, or parent who has a serious health condition; or because of an employee's own health condition.

When taking leave because of the birth or placement of a child the following conditions apply: the leave expires at the end of the 12 month period after such birth or placement; such leave may not be taken intermittently unless the employee and the employer agree otherwise. Leave to care for a seriously ill family member or one's own serious illness may be taken intermittently when medically necessary, subject to the certification requirements. Leave may be taken on a reduced leave schedule upon agreement between the employer and the employee.

Leave may be unpaid. The employee or employer may elect to substitute for leave due to the birth or placement of a child or leave to care for a seriously ill family member, and accrued paid vacation leave, paid personal leave, or paid family leave. The employee or the employer may elect to substitute for leave due to an employee's own serious illness any accrued paid vacation leave, paid personal leave, paid sick leave or paid medical leave. Such paid leave may offset any part of the required unpaid leave and may be reduced from the 12-week period.

When the need for leave is foreseeable, the employee shall provide reasonable prior notice. When the need for leave is foreseeable based on planned medical treatment or supervision, the employee shall make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider of the employee or of the employee's child, spouse, or parent.

When a husband and wife employed by the same employer are entitled leave because of the birth or placement of a child or to care for a sick parent, the aggregate period of family leave may be limited to 12 weeks.

### *Section 103. Certification*

An employer may require medical certification stating: (1) the date on which the serious health condition commenced, (2) the probable duration, and (3) medical facts regarding the condition. For purposes of medical leave, such certification shall also state

that the employee is unable to perform the functions of his or her position. For purposes of family leave to care for a seriously ill child, spouse or parent, such certification shall include an estimate of the amount of time that the employee is needed to care for the child, spouse or parent. The employer may require, at its own expense, a second medical opinion and periodic recertifications. Should the first and second opinions differ, the employer may require at its own expense the opinion of a third jointly approved health care provider, whose opinion shall be binding. The employer may require recertifications during the leave.

#### *Section 104. Employment and benefits protection*

This section entitles any employee upon the return from leave to be restored to the same or an equivalent position.

The taking of leave shall not result in the loss of any benefits earned before the leave. Nothing in this section shall entitle any employee to any right or benefit to which the employee would not have been entitled upon beginning the leave. The employer may require periodic reporting on intention to return to work.

The employee's pre-existing health benefits shall be maintained during any leave.

#### *Section 105. Prohibited acts*

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under this title.

#### *Section 106. Administrative enforcement*

This section authorizes the Secretary of Labor to issue such rules and regulations as are necessary to carry out this section.

Any person alleging an act in violation of this title may file a charge with the Secretary. A charge must be filed within 1 year after the last event constituting the alleged violation.

The Secretary has 60 days to investigate the charge and either issue a complaint or dismiss the charge. The Secretary and the respondent may enter into a settlement agreement concerning a complaint, except that such agreement shall not be entered into over the objection of the charging party, unless the Secretary determines that the settlement provides full remedy to the charging party.

If at the end of the 60 day period, the Secretary has not (1) issued a complaint, (2) dismissed the charge, or (3) entered into or disapproved a settlement agreement, the charging party may bring a civil action as provided under this title. Such election shall bar further administrative action by the Secretary.

An administrative law judge shall commence a hearing within 60 days of the issuance of the complaint. The decision of the administrative law judge shall become the final decision of the agency unless appealed by the aggrieved party within 30 days or the Secretary modifies or vacates the decision, in which case the decision of the Secretary is the final decision.

Any person aggrieved by a final order may obtain review in the U.S. court of appeals within 60 days after entry of the final order.

### *Section 107. Enforcement by civil action*

Either an employee or the Secretary may bring a civil action against any employer to enforce the provisions of this title in any appropriate U.S. or state court. A civil action may not be commenced if the Secretary has approved a settlement agreement or issued a complaint.

No civil action may be commenced more than 1 year after the date of the last event constituting the alleged violation.

### *Section 108. Investigative authority*

This section provides the Secretary with investigative authority as empowered under section 11(a) of the FLSA.

### *Section 109. Relief*

An employer found in violation is liable to the injured party for wages, salary, employment benefits, or other compensation denied to such employee, with interest, and an additional amount equal to the greater of either (1) the above amount or (2) consequential damages, not to exceed 3 times the amount determined above, but not to accrue prior to 2 years before action is brought.

The court may in its discretion reduce the amount of liability upon proof that the employer acted in the reasonable and good faith belief that it was not violation of this title.

The prevailing party, other than the United States, may be awarded reasonable attorney's fees.

### *Section 110. Special rules concerning employees of local educational agencies*

A public or private elementary or secondary school will not be considered in violation of any existing laws solely because leave was provided.

If a public or private elementary or secondary school teacher seeks to take intermittent medical leave which is foreseeable based on planned medical treatment and if such leave will result in the teacher's absence from the classroom over 20% of the time, the teacher may be required to either (a) take continuous leave for the entire treatment period or (b) be placed in an equivalent position that would not be disruptive to the classroom.

A public elementary or secondary school teacher may be required to extend leave through the end of a semester if a teacher would otherwise have returned within the last 2-3 weeks of the semester's end, depending on the date on which the leave commenced and the duration of the leave.

For purposes of certain enforcement actions, determinations shall be made on the basis of established school board policies.

### *Section 111. Notice*

Each employer shall post a notice setting forth the pertinent provisions of this title. Any employer who willfully violates this section is liable up to \$100 for each offense.

### *Section 112. Regulations*

The Secretary shall prescribe regulations within 60 days.

## TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

This title extends coverage of the Act to federal government civil service employees.

## TITLE III—COMMISSION ON LEAVE

*Section 301. Establishment*

This section establishes the Commission on Leave.

*Section 302. Duties*

The Commission shall conduct a comprehensive study of existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies on employers. The Commission shall submit a report to the Congress within 2 years.

*Section 303. Membership*

The Commission shall be composed of 12 voting members and 2 ex-officio members appointed by the Senate and the House. Such members shall be appointed by virtue of demonstrated expertise in family, temporary disability and labor-management issues and shall include representatives of employers. The Secretary of Health and Human Services and the Secretary of Labor shall serve as non-voting ex-officio members.

*Section 304. Compensation*

The Members of the Commission shall be unpaid.

*Section 305. Powers*

The Commission shall meet within 30 days of appointment and shall hold such hearings as appropriate, and may obtain information and assistance from federal agencies.

*Section 306. Termination*

The Commission shall terminate 30 days after the date of the submission of its final report to the Congress.

## TITLE IV—MISCELLANEOUS PROVISIONS

*Section 401. Effect on other laws*

Nothing in this Act shall be construed to affect any federal or state law prohibiting discrimination or any state law which provides greater leave rights.

*Section 402. Effect on existing employment benefits*

Nothing in this Act shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan.

*Section 403. Encouragement of more generous leave policies*

Nothing in this Act shall be construed to discourage employers from adopting policies more generous than required under this Act.

*Section 404. Coverage of the Senate*

The rights and protections established under sections 101 through 105 shall apply to employees of the Senate. The Select Committee on Ethics shall investigate and adjudicate claims raised by any individual under this provision.

*Section 405. Regulations*

The Secretary shall prescribe such regulations as are necessary to carry out this Act within 60 days after the date of enactment.

*Section 406. Effective dates*

This act shall generally take effect 6 months after the date of enactment. In the case of a collective bargaining agreement, the Act shall take effect upon the termination of the agreement, but no later than 12 months after enactment. The Commission on Leave shall take effect on the date of enactment.

IX. COMMITTEE ACTION

On April 24, 1991, the Chairman of the Committee on Labor and Human Resources, Senator Kennedy, convened an Executive Session of the Committee to consider S. 5.

The Committee considered and accepted an amendment offered by Senator Kennedy to extend family and medical leave coverage to Senate employees.

The Committee considered a motion to favorably report the bill as amended, as an amendment in the nature of a substitute. By roll call vote of 12 to 5, the Committee agreed to the motion.

YEAS

Kennedy  
Pell  
Metzenbaum  
Dodd  
Simon  
Harkin  
Adams  
Mikulski  
Bingaman  
Wellstone  
Jeffords  
Coats

NAYS

Hatch  
Kassebaum  
Thurmond  
Durenberger  
Cochran

## X. MINORITY VIEWS

---

### MINORITY VIEWS OF SENATORS COCHRAN, KASSEBAUM, DURENBERGER, THURMOND, AND HATCH

This legislative proposal is essentially identical to legislation which was vetoed by President Bush during the 101st Congress. The President returned that legislation to Congress with a concise message that outlined several critical reasons for his signature being withheld. Each of these reasons are valid today as we evaluate the merits of this current proposal. We attach this veto message as a part of these views.

Nonetheless, we wish to make it abundantly clear that each of us strongly supports the concept of providing time off from work for family and medical purposes. But means, not motives, must guide a rational determination of whether any particular legislative product is worthy of support. In this case, this proposal seeks to mandate a national leave policy that will reduce overall employee benefits. Employers will be forced to eliminate voluntary benefits in order to pay for the mandated ones. New family and medical leave requirements in S. 5 will burden employers, especially smaller and medium sized businesses, with the costs of mandated leave regardless of their ability to absorb such costs and will create a new federal bureaucracy to administer and enforce this mandated leave policy.

Our view is that family leave is desirable and should be encouraged through a policy of providing incentives and lifting legal restrictions. This will enable more employers to provide family and medical leave and will preserve the elements of choice and flexibility inherent in the successful employer-employee relationship that has been the foundation of our free enterprise system.

#### I. BACKGROUND

America is fast becoming a society in which nearly everyone works. Today over two-thirds of the nation's adult women are in the workforce, and over half of the mothers with children are employed full-time. We have some 29 million two-income families with 25 million women. According to Workforce 2000 and other labor studies, two-thirds of the new entrants into the workforce between now and the end of this century will be women, most of them in their childbearing years, and two-thirds of all preschool children will have mothers working outside the home. Clearly, one of the tasks we face is to reconcile the conflicting needs of women, work, and families.

Working parents should not be forced to choose between careers and families. They need to be able to continue to hold their jobs

and earn income to support their families, while at the same time raise their families, have babies, tend to their children's needs, and care for sick infants and ailing parents. Balancing is required so that family needs and the demands of the workplace are both accommodated.

Granting family and temporary medical leave is an admirable idea whose time has come. It should be encouraged in the workplace. To remain competitive in the job market, to recruit and retain good employees, and to improve productivity, particularly in a time of growing skilled labor shortages, employers will want to offer more attractive benefits. Family and medical leave will help to alleviate the concerns of working men and women with young children and aging parents. Such benefits will also ease the transition from welfare to work for low-income and disadvantaged families. In our view, every effort should be made—short of federal mandates—to encourage more and more employers to include family and medical leave among the benefits they provide their employees.

## II. PROBLEMS

The practical problems and costs associated with *mandating* family and medical leave are, however, considerable. Congress cannot properly and adequately determine and regulate the individual needs of workers and their families. Government should not force its judgment concerning such needs into the employer-employee relationship. It is one thing for employers to decide to offer employees a package of benefits that includes family leave. It is quite another for the federal government to dictate what benefits an employer must provide and to whom and under what conditions.

If the Congress compels an employer to provide a particular benefit, the total package of benefits is not necessarily enlarged. Instead, it may necessitate the removal or reduction of some other benefits—benefits that employees may prefer. When employers are able to offer a wide array of benefits, the individual employee can select the kind of benefit most suitable to his or her needs. The growing trend toward more flexible benefit programs in the workplace will be constrained by mandating family and medical leave, much to the detriment of those employees who do not need or desire such leave.

As a practical matter, more women than men will take advantage of family leave. Thus, mandated leave would be especially costly for firms which employ a majority of women. This will almost certainly lead to a loss of employment opportunities for young women of childbearing age, as well as low-skilled or marginal workers and teenagers, whose jobs will be sacrificed to pay for these added benefits.

We are concerned by the growing trend we perceive in the Congress toward mandating benefits. It is now a widely accepted proposition that we can no longer afford to create gigantic new federal spending programs because they add to the budget deficit and fuel inflation. However, the supporters of S. 5 seem to be arguing that Congress can simply mandate that business provide these benefits,

at their own expense, without costing the U.S. Treasury any more than the cost of policing and regulating these programs. Proponents of this approach overlook the European experience with mandated benefits, which is that they have contributed significantly to economic stagnation. We should think long and hard before embarking on a policy which would reduce our competitiveness and result in the loss of American jobs.

### III. CONCLUSION

In summary, we believe that encouraging the expansion of family and medical leave is a good idea. It is good business policy; it is good family policy. That is why we endorse the idea of providing incentives for encouraging the adoption of family leave programs and of retaining choice and flexibility in benefits policy. At the same time we should reexamine and reform those statutes and regulations that restrict the ability of working parents to spend more time with their families. For instance, some wage and hour laws need to be amended to permit more flextime and comp-time and work at home.

However, for each of the reasons contained in these views, and for all of the reasons contained in the attached veto message from the President, we cannot support the approach contained in the current version of the "Family and Medical Leave Act of 1991." Moreover, for all of these same reasons, the Secretary of Labor has already informed members of this Committee that this proposal, like its predecessor, is destined for a veto.

In sum, mandating family and medical leave benefits, as S. 5 would do, will be unnecessarily injurious to our economy as it attempts recovery. In addition, it will be counterproductive, especially for women in the workforce. Lastly, because this legislation is destined for veto, it does nothing more than widen the partisan split over an issue which should not be partisan in the first place. This makes no sense and will do nothing for America's families.

THAD COCHRAN.

DAVE DURENBERGER.

ORRIN G. HATCH.

NANCY LANDON KASSEBAUM.

STROM THURMOND.

THE WHITE HOUSE  
OFFICE OF THE PRESS SECRETARY,  
*Washington, DC, June 29, 1990.*

*To the House of Representatives:*

I am returning herewith without my approval H.R. 770, the "Family and Medical Leave Act of 1990." This bill would mandate that public and private employers with 50 or more employees, and the Federal Government, provide their employees with leave under specified circumstances.

In vetoing this legislation with its rigid, federally imposed requirements, I want to emphasize my belief that time off for a child's birth or adoption or for family illness is an important benefit for employers to offer employees. I strongly object, however, to

the Federal Government mandating leave policies for America's employers and work force. H.R. 770 would do just that.

America face its stiffest economic competition in history. If our Nation's employers are to succeed in an increasingly complex and competitive global marketplace, they must have the flexibility to meet both this challenge and the needs of their employees. We must ensure that Federal policies do not stifle the creation of new jobs, nor result in the elimination of existing jobs. The Administration is committed to policies that create jobs throughout the economy—serving the most fundamental need for working families.

The strong American labor market of the past decade is a sign of how effectively our current labor policies work. Between 1980 and 1989, the United States created more than 18 million new jobs. In contrast, within European countries, where mandated benefits are more extensive and labor markets less flexible, job growth has been weak. Between 1980 and 1989, all of Europe generated only 5 million new jobs. As a Nation, we must continue the policies that have been so effective in fostering the creation of jobs throughout our economy. H.R. 770 is fundamentally at odds with this crucial objective.

H.R. 770 ignores the realities of today's work place and the diverse needs of workers. Some employees may believe that shorter paid leave is more important than the lengthy, unpaid leave mandated by this legislation. Caring for a sick friend, aunt, or brother might be just as critical to one employee as caring for a child is to another. In other cases, some employees may prefer increased health insurance or pension coverage rather than unpaid family and medical leave.

Choosing among these options traditionally has been within the purview of employer-employee negotiation or the collective bargaining process. By substituting a "one size fits all" Government mandate for innovative individual agreements, this bill ignores the differing family needs and preferences of employees and unduly limits the role of labor-management negotiations.

We must also recognize that mandated benefits may limit the ability of some employers to provide other benefits of importance to their employees. Over the past few years, we have seen a dramatic increase in the number of employers who are offering child care assistance, pregnancy leave, parental leave, flexible scheduling, and cafeteria benefits. The number of innovative benefit plans will continue to grow as employers endeavor to attract and keep skilled workers. Mandated benefits raise the risk of stifling the development of such innovative benefit plans.

My Administration is strongly committed to policies that recognize that the relationship between work and family must be complementary, and not one that involves conflict. If these policies are to meet the diverse needs of our Nation, they must be carefully, flexibly, and sensitively crafted at the work place by employers and employees, and not through Government mandates imposed by legislation such as H.R. 770.

GEORGE BUSH.

THE WHITE HOUSE, June 29, 1990.

## MINORITY VIEWS OF SENATOR HATCH

Facilitating a better balance between work and family is not a partisan political issue. The interests of the American family are not in conflict with the overall interests of our nation's commerce. In fact, they are one and the same. A vital economy creates job opportunities, provides an astounding array of consumer goods and services, and leads to a quality of life for American families that is the envy of the world.

The debate surrounding the "Family and Medical Leave Act of 1991" (S. 5), however, has turned the interests of the family into a heated partisan squabble over federally mandated fringe benefits, erroneously pitting the interests of the family against our nation's overall economic well-being. Thus, this debate has strayed far from one in which the needs and desires of the family are the paramount issue. The debate has unfortunately become another dead-end, special interest confrontation.

Recognizing this, President Bush, in a veto message accompanying the return of essentially identical legislation to the Congress without signature last year, provided a clear and convincing explanation of its failure to strike an acceptable balance between the needs of the family and the needs of a vital American system of enterprise.

But, as compelling as any of these reasons are for rejection of this legislative proposal, I have additional concerns which strike at the fundamental purposes of this proposal. My concerns are about its ineffectiveness; discriminatory impact; and rigid inflexibility. And, based on my evaluation of the facts in each of these areas, I must strongly oppose this legislation based on my concern for the overall welfare of the American family.

### *I. The ineffectiveness of S. 5*

Over the past six years, each Senate office had been flooded with mail insisting on either unqualified support or total rejection of this and similar preceding proposals. The opponents, mainly businesses, point chiefly to the disruptive nature and negative economic impacts of this proposal. In contrast, the proponents have focused on fundamental social objectives which, they assert, will be addressed by this legislation. Satisfaction of these objectives, proponents argue, justifies enactment of this proposal.

Whether these important objectives would truly be satisfied if this proposal, which provides 12 weeks of unpaid leave, became law is what I would like to analyze.

#### A. OBJECTIVE—BONDING BETWEEN PARENT AND CHILD

"Bonding" is the interaction between parent and child that begins immediately after birth and foreshadows an infant's later

socio-emotional development. Without this post-birth intimacy, many children, we are told by the experts, have a higher risk of developmental difficulty.

A May 20, 1991 article in *Fortune* magazine, and a host of recent studies on this subject, strike at the heart of this issue. They provide many unsettling examples of the types of developmental difficulties that child development experts are discovering as a result of vacant post-birth intimacy, and the subsequent toll these problems can cause for society at large.

For instance, the *Fortune* article cited a study of kindergarten and first-grade children in North Carolina in which "early day care kids (those placed in the care of nonparents before the second year) were found more likely than others to hit, kick, push, threaten, curse, and argue with their peers" later in life. Also cited in this article were findings by researchers at the University of Connecticut which found "higher levels of misbehavior and greater withdrawal from the company of others for those who had been in day care as infants, no matter what the educational level of their parents." There are many more examples.

Attempting to explain what this "bonding" relationship between parent and child entails, Dr. Eleanor Szanton, executive director of the National Center for Clinical Infant Programs, stated in testimony before this Committee that this bonding process creates an "emotional root system for the future growth and development" of our children.

However, Dr. Szanton and other experts point out that this bonding between parent and child is a function that simply cannot be accomplished in 12 weeks. According to Dr. T. Berry Brazelton, chief of the child development unit of Boston's Children's Hospital, this process demands a *minimum* (emphasis added) of 16 weeks. And, a formal advisory panel, of which Dr. Brazelton and Dr. Szanton were both members, recommended a 6-month minimum period.

More accurately, "bonding" between parent and child is a continuous process which lasts throughout a child's formative years according to the experts. In a recent study conducted by the Family Research Council, a comment on this bonding process by the late British psychoanalyst John Bowlby was cited. He said, "the young child's hunger for his mother's love and presence is as great as his hunger for food."

In his work, Bowlby found that children form an intimate bond or attachment with parents during the first three years of life, and that the strength and security of this bond greatly influence how children view themselves and how well they interact with others. According to Bowlby, a bonding process with parents who are warm, nurturing and accessible leads children in these early developmental stages, to gradually view themselves as worthy, and lovable. In contrast, he found that children, whose parents are rejecting, unresponsive or neglectful of their needs typically struggle with profound feelings of insecurity and low self-esteem.

A recent white paper by the Family Research Council also calls our attention to research by another prominent psychologist, Mary Ainsworth. In that research, Ainsworth determined that the second half of a baby's first year of life is an especially critical phase in the attachment or "bonding" process because this is when a "clear-

cut" attachment first blooms. During this phase, babies typically begin to approach, cling, and protest separation with parents, as well as to search for objects hidden from view and recall that an object continues to exist even when they cannot see, hear, smell or taste it. According to Ainsworth, this very important phase continues well into the second and third years of life.

There is much more. But, almost universally, these studies indicate that 12 weeks is an arbitrary figure having little relationship to the evidence regarding the needs of our children for "bonding" with parents. Such an arbitrary time period has little relationship to an object of avoiding the behavior problems associated with developmental difficulties which may result from a failure to forge this "bonding" between parent and child.

In conclusion, it is interesting to note the comments of one of the original sponsors of this approach. Representative Patricia Schroeder observed with reference to a minimal time frame required for this "bonding" function, that 12 weeks is not enough to satisfy this important objective of "bonding." In 1986, in direct response to a question on the duration of time needed for this "bonding" process she said, "all knowledge we have tells us that four months is what you need."

Thus, if the needs of the family are critically important to the Congress, we must conclude that S. 5 is a proposal which fails to satisfy this objective.

#### B. OBJECTIVE—CARE FOR FAMILY MEMBERS WITH SERIOUS ILLNESSES.

A second critical objective for this legislative proposal is the alleviation, or a significant reduction, of conflicts between work and family when a family member becomes seriously ill and requires the attention and love of family members.

Examples of the circumstances demanding such attention are offered in this report. For instance, testimony from Ms. Dot Holland, the Director of Social Work at Henrietta Eggleston Hospital for Children in Atlanta, Georgia is quoted as stating that most hospitals expect a parent to remain with a child in the hospital for most of the time during the child's stay. This report then offers several examples of the types of serious illnesses of family members that this proposal is meant to address, such as "heart attacks, most cancers, strokes, severe respiratory conditions, severe nervous disorders," etc.

These two statements document the inadequacy of the 12 weeks provided in S. 5. By definition, a serious illness is one that could run far in excess of 12 weeks. Moreover, in many cases, a serious or terminal illness which requires extended care, such as cancer, may lead to a determination by a working individual that, in addition to the benefits to a recovery which would flow from the love and attention of a family member, it would also be *cost-effective* to keep such individual home for continuing care rather than to commit such family member to institutional care. In these cases, 12 weeks falls far short of the time needed according to the aforementioned experts and Representative Schroeder, and could create a "Hobson's choice" for the working parent.

Another example is the time needed to care for elderly parents. A family may be confronted with a choice of whether to provide continuing care for a seriously ill elderly parent at home or to place that parent in an institutional environment. The costs associated with institutional care are obviously factored into that decision. Once again, unless it is certain that the need for care will not stretch beyond 12 weeks, choice is not available in S. 5.

In conclusion, this report conveniently cites example after example where "approximately 12 weeks" would provide families with a better work and family balance. However, the evidence indicates that 12 weeks is nothing more than an arbitrary number which has been chosen because of the adverse relationship that any federally mandated employee benefit has on the economy. The evidence presented in this report, rather than demonstrating effectiveness, documents ineffectiveness and major inconsistencies between family objectives and the ability of S. 5 to meet them.

Moreover, the only evidence which suggests that S. 5 would effectively assist families are isolated examples of where the need for short-term leave has resulted in an employee losing a job. However, evidence clearly indicates that: (1) almost half of working parents in America would be excluded from coverage under this bill (because of the exemption for companies with fewer than 50 employees); and (2) of those remaining employees covered, all but a handful are provided benefits which are intended to cover these type of situations. Therefore, this proposal is applicable to only a limited number of working parents, and then, only in "worst case" situations.

## II. THE DISCRIMINATORY IMPACT OF S. 5

Mandated employees benefits are not free. Having to accept this economic fact of life, proponents exempt businesses with fewer than 50 employees from coverage. In doing so, they exempt 95 percent of the employers in this nation, and exclude almost half of the working parents in the nation. Although proponents of this "mandated fringe benefit" approach view this widespread exclusion as an advantage for many of the individuals who currently receive the least benefits it is nothing short of a discriminatory impact.

An abundance of research which has been conducted by the Small Business Administration, and is contained in the SBA's small business data base, indicates that women and other minority groups are found disproportionately working in smaller businesses. Those businesses are exempt from coverage under this proposal. Therefore, those who are the logical principal beneficiaries of this proposal are denied benefits because of the economic realities associated with small business ownership.

Moreover, this is a double-barrelled discrimination. Faced with increased operational costs that flow from a mandated employee benefit, employers will have to either cut back on the costs of doing business (including labor costs), or increase the prices for the goods and/or services they provide. These price increases are borne by all consumers, including those excluded from coverage under the bill. Thus, while half of the working parents in America are excluded, all must pay.

Additionally, as pointed out in an 1988 study conducted for the CATA Institute, economist Deborah Walker of Loyola University found that discrimination against young, married women might increase with passage of legislation such as S. 5. "To avoid the added costs, employers might find it cost-effective to discriminate against married women of child-bearing age, since these women could end up costing a firm more than they contribute to its worth," she asserted. Ms. Walker concluded, "the precise outcomes of legislating mandatory family leave cannot be known in advance . . . (but) the economic analysis presented earlier clearly demonstrates that, by grouping women together and taking choices away from employers, a mandatory family-leave policy would increase discriminatory hiring practices, not decrease them."

The meaning of this finding is driven home clearly in a recent survey of 950 business operators conducted by the Gallup Organization. According to the survey, women of child-bearing age and low-skilled workers would find it more difficult to find jobs if legislation such as S. 5 were enacted into law. Specifically, 40 percent of the business owners stated that they would be less likely to hire young women, while 38 percent said they would be more likely to reduce the number of jobs for low-skilled workers.

This dramatic finding led the President of the National Federation of Independent Business (NFIB), Mr. John Sloan, to state that while his organization fully supported the concept of family and medical leave, "it is clear that government intervention (by imposing a new, mandated employee benefit) . . . would be counterproductive."

Moreover, recent trends in the fringe benefit structures of American companies reveal that employees are interested in negotiating with employers for benefits that are relevant to their own individual needs. For instance, a recent survey conducted found that 89 percent of American workers prefer to have fringe benefits established with their own input rather than to have rigid, inflexible benefits established by the federal government. There are many examples of the benefits now being negotiated between employee and employer, such as a recent announcement by the Federal National Mortgage Association (Fannie May) that it will finance \$1 billion in home mortgages through employer-assisted initiative. The Marriot Company recently announced a tax-free family-care spending account for employees that allows them to set aside a portion of their salary on a pretax basis to pay for dependent care. In many of its facilities, Marriot offers child care facilities and provides many other family-oriented benefits.

In fact, according to the U.S. Department of Labor, more benefits to ease conflicts between work and family life appear to have been negotiated in recent years than in any time in history, indicating a very "clear trend." Recent indications by many employers, however, is that federal mandates in the employee benefit area would cause them to cease expansion of other potential new benefits. As they explain it, the "benefit pie" only has so many slices, and once they are gone, that is it.

The discriminatory impact here is that many employees may end up sacrificing needed benefits in order to pay for benefits enjoyed only by a few. For instance, elderly workers, may choose additional

retirement oriented benefits which may be much more attractive than family leave type benefits. Other employees may desire on site child care, or profit sharing arrangements to save for education for children.

Finally, recent data suggests that employers providing leave benefits such as those which would be required under this proposal may place additional burdens on other employees rather than hiring temporary replacements for workers taking leave under S. 5 if it were enacted. The thought of having some employees having to work overtime, and being denied time with families, to satisfy mandates by the federal government, seems contradictory to the family purposes of S. 5. This is a discrimination against many families for the benefit of a few.

### III. S. 5 STIFLES FAMILY CHOICE THROUGH THE IMPOSITION OF RIGID, INFLEXIBLE FEDERAL MANDATES

Recent Census Bureau data shows that currently, 67.1 percent of all mothers remain home with a newborn after 12 weeks have passed. Almost 50 percent of all new mothers do not work for pay at all during a child's first year of life. Thus, unless S. 5 is meant to encourage mothers to leave newborns and return to work, it has no relevance for a majority of mothers who wish to care for newborn children.

A recent Gallup poll reveals that 99 percent of all employees questioned believed that benefits other than 12 weeks of mandated family and medical leave were more important for them and better met their individual needs. Only one percent of the employees questioned believed that parental leave would be their most important benefit. Thus, S. 5 seems to respond to the needs of a very narrow group of individuals.

A recent national survey by Penn and Schoen found that 89 percent of American workers prefer to have fringe benefits established through employee-employer negotiations rather than to have them established through federal mandates. Thus, the vast majority of American employees say thanks but, no thanks, to inflexible federal dictates. They prefer to make their own choice.

A 1990 Census report reveals that between 1981 and 1984, 43 percent of the women who returned to work 3-12 months following the birth of a child choose part-time employment over full-time employment. A 1990 Roper poll found that only 15 percent of all U.S. women believed that a maternity leave of 12 weeks was enough. And, in contrast, fully half of these women expressed a desire to remain away from work for the first two or three years of their child's life, and 39 percent of the women responding stated that they would prefer to remain with a newborn until they started school at age six. Thus, the vast majority of women believe that S. 5 does not address their family needs.

In sum, it is abundantly clear the Family and Medical Leave Act is not a benefit of choice, and that given choice, American workers value benefits or relevance to their own circumstances far above those provided under S. 5.

At the same time, a recent Harris poll finds that a full 73 percent of the workers surveyed believed that their employer already

made adequate provision for both emergency and regular needs of working parents. A survey conducted by the United States Chamber of Commerce of the membership revealed that a full 99 percent of the 6,367 surveyed voluntarily provided some type of paid fringe benefits, whether hospital coverage, profit sharing, dental plans, defined contributions plans and/or family leave.

In summary, it is clear that S. 5 is a rigid, inflexible federally mandated benefit which falls far short of the needs and wants of American families. It would not provide what the majority of people want, and the only real beneficiaries of this proposal would be a handful of special interests and organized labor who seek to breach the boundaries of what have traditionally been voluntary fringe benefits negotiated between employers and employees.

#### IV. AN ACCEPTABLE ALTERNATIVE WHICH STRIKES BALANCE BETWEEN WORK AND FAMILY WHILE BALANCING THESE NEEDS WITH A VITAL ECONOMY.

When all these flaws are put together, it should be obvious that this proposal cannot get the job done. What is more, to do so, a federally mandated fringe benefit would have to far exceed reasonable economic constraints. Thus, if we are to remain on the road to economic recovery while facilitating true balance between family and work, Congress must use a different approach than a mandated employee benefit. I believe such an approach is embodied in S. 418, the "American Family Protection Act of 1991."

Under the "American Family Protection Act," six years, or 312 weeks—not 12 weeks—would be available for parents to "bond" with children. Also, under this proposal, 2 years, or 104 weeks—not 12 weeks—would be available to care for elderly family members with a serious illness. Also, 104 weeks, not 12 weeks, would be available for parents with children or other close family members who suffer from a serious health condition to provide needed continuing care.

Subject to certain reasonable requirements, such as providing advance notice if possible, and providing certain information documenting the family purpose, the choice of how much time should be taken off is in the hands of any employed individual who meets criteria similar to those under S. 5. Once away from work, in performance of this family purpose, such individual could work part-time without losing any rights to reemployment.

Following performance of these family responsibilities, an individual would apply for reemployment with the employer. If the same, or a similar job is then available, the employer would be required to restore such employee to that position with restoration of all seniority, salary levels, benefits and status that had been earned prior to leaving employment. If the same, or a similar job, is not available at the time of application for reemployment, but becomes available within one year, an employer would bear a responsibility to notify the individual.

This approach would not require an employer to provide any benefits which have not been earned. Thus, economic interests are brought into balance with the desire of workers.

For all of these reasons, the approach taken by the "American Family Protection Act" is preferable to the approach embodied in the "Family and Medical Leave Act." It is an effective approach in terms of its ability to permit "bonding" and full and adequate care for seriously ill elderly parents and close family members. It is an approach which does not discriminate. All employers, regardless of size, are covered under this approach. And, since no additional costs are generated, the costs of leave for some are not passed on to others who are denied benefits. Lastly, it is a flexible approach to family needs that keeps choice where it belongs—in the family.

ORRIN HATCH.

## MINORITY VIEWS BY SENATOR DAVE DURENBERGER FAMILY AND MEDICAL LEAVE

Twenty-eight states and the District of Columbia currently have adopted some type of family, or pregnancy leave state policy protecting workers during the birth or adoption of a child. Yet only 6 of these states include medical leave as part of this policy. And only one of these provides as broad of coverage as is provided under S. 5, the Family and Medical Leave Act of 1991. I support a parental leave policy much like what is contained under S. 5, but do not believe it is wise at this time to go forward with a new mandated medical leave policy at the federal level when so few states have elected to enact similar legislation at the state level.

The issue here—job protection for the birth or adoption of a child, or reasonable leave during a family medical emergency—is vitally important if we are to address the work-family needs to today's employees. Because of this, I introduced legislation, S. 688 the Family Financial and Job Security Act of 1991, that would provide virtually the same parental leave policy as is provided under S. 5 but substitutes the 12 week unpaid medical leave provision with a new expanded definition of sick leave to allow an employee to use their own sick leave for the care of a sick child, spouse or parent.

Last year, the State of Minnesota tried to amend their parental leave policy to add a medical leave provision similar to the medical leave under S. 5. The Minnesota legislature—not known for its conservative leanings—rejected this proposal in lieu of an expanded sick leave proposal similar to the one in my amendment. It did so because they thought the expanded unpaid sick leave would be too disruptive to business and because they recognized that the same benefits could be jprovided in a more efficient manner. I believe they are right.

I believe my sick leave proposal has several advantages to the Medical leave provided in S. 5.

First, I believe my proposal offers a greater benefit to an employee by not only offering job security but also by offering financial security. While the overall amount of time offered under my amendment is shorter, the leave offered is generally paid leave. A report by the House Select Committee on Aging showed that of the people who use this type of leave 80% take leave for less than five days. Thus, it is my belief that—especially for low-income workers—a short period of paid leave is of greater value than a longer period of unpaid leave. By offering employees paid leave, my proposal treats low-income and high-income individuals equally and doesn't discriminate against those who can't afford to take 12 weeks off unpaid.

Second, the medical leave under my proposal is broader in coverage—and thus provides a greater benefit to employees—than S. 5. Under S. 5 an individual can only take leave for a serious medical condition and must go through an extensive proof of eligibility. This is a very complicated process for the employee and is administratively bureaucratic for the employer. My bill allows an employee to use their own leave for all medical needs of an immediate

family member, and whatever rules the employer has established for using sick leave.

This is a process that is well-tested and could be used for the broadest range of family health situations that often come up with no warning and that require relatively brief absences from work. Contagious childhood illnesses, extra care needed for a spouse or parent on the first day following surgery, and extra time needed to place a parent in a nursing home are just three good examples. These are situations that present very real conflicts for many employees, but which are not included under the more cumbersome procedures needed to access the medical leave benefits mandated under S.5.

Finally, not only do I think this approach is better for the employee, but I also think it addresses the employers concerns about a new mandate. My proposal uses the existing employee benefit structure to get at the same ends offered under S. 5 without creating a new mandate. Sick leave is a well established benefit that employers are comfortable with and have experience with. My approach does not mandate that one has a sick leave policy, only that if you do that you allow for this expanded converge.

The cost of my proposal would be minimal. Sick leave is already accounted for in an employers accounting system. And, in many cases, my proposal will simply legitimize current practice that is already happening "under the table."

As we attempt to resolve the work-family needs of today's workers, I believe it is wise to approach this issue incrementally. How we structure employee benefit packages to meet the needs of families in the 21st century and what role government has in this process are questions that are not easily answered. Until we have a clearer sense of the answers, I believe it is best to move forward incrementally.

## XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI of paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

## UNITED STATES CODE

### TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

\* \* \* \* \*

## § 2105. Employee

(a) \* \* \*

\* \* \* \* \*

(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter [53] 53, subchapter V of chapter 63, and sections 5550 and 7154 of this title) administered by the Civil Service Commission; or

\* \* \* \* \*

## Subpart E—Attendance and Leave

### CHAPTER 63—LEAVE

#### Subchapter I—Annual and Sick Leave

\* \* \* \* \*

#### SUBCHAPTER V—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE

- 6381. Definitions.
- 6382. Leave requirement.
- 6383. Certification.
- 6384. Job protection.
- 6385. Prohibition of coercion.
- 6386. Health insurance.
- 6387. Regulations.

\* \* \* \* \*

#### Subchapter V—Family Leave

### § 6381. Definitions

For purposes of this subchapter:

(1) The term “employee” means—

(A) an “employee”, as defined by section 6301(2) of this title (excluding an individual employed by the government of the District of Columbia); and

(B) an individual described in clause (v) or (ix) of such section;

who has been employed for at least 12 months and completed at least 1,000 hours of service during the previous 12-month period.

(2) The term “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment, or continuing supervision, by a health care provider.

(3) The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(4) The term "parent" means the biological parent of the child or an individual who stood in loco parentis to a child when the child was a son or daughter.

### **§ 6382. Leave requirement**

(a)(1) An employee shall be entitled, subject to section 6383, to 12 workweeks of leave during any 12-month period—

(A) because of the birth of a son or daughter of the employee;

(B) because of the placement of a son or daughter with the employee for adoption or foster care;

(C) in order to care for the son, daughter, spouse, or parent of the employee who has a serious health condition; or

(D) because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Leave under subparagraph (A) or (B) of paragraph (1) shall not be taken by an employee intermittently unless the employee and the employing agency agree otherwise. Leave under subparagraph (C) or (D) of paragraph (1) may be taken intermittently when medically necessary, subject to subsection (e).

(b) On agreement between the employing agency and the employee, leave under this section may be taken on a reduced leave schedule. Such reduced leave schedule shall not result in a reduction in the total amount of leave to which the employee is entitled.

(c) Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

(d)(1) If an employing agency provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title may be provided without compensation.

(2)(A) An employee may elect, or an employing agency may require the employee, to substitute for leave under subparagraph (A), (B), or (C) of subsection (a)(1) any of the accrued paid vacation leave, personal leave, or family leave of the employee for any part of the 12-week period of such leave under such paragraph.

(B) An employee may elect, or an employing agency may require the employee, to substitute for leave under paragraph (1)(D) of subsection (a) any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for any part of the 12-week period of such leave under such paragraph, except that nothing in this Act shall require an employing agency to provide paid sick leave or paid medical leave in any situation in which such employing agency would not normally provide any such paid leave.

(e)(1) *In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or adoption, the employee shall provide the employing agency with prior notice of such expected birth or adoption in a manner that is reasonable and practicable.*

(2) *In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment or supervision, the employee—*

*(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse or parent of the employee; and*

*(B) shall provide the employing agency with prior notice of the treatment or supervision in a manner that is reasonable and practicable.*

### **§ 6383. Certification**

(a) *An employing agency may require that a claim for leave under subparagraph (C) or (D) of section 6382(a)(1), be supported by certification issued by the health care provider of the employee or of the son, daughter, spouse, or parent of the employer, as appropriate. The employee shall provide a copy of such certification to the employing agency.*

(b) *A certification under subsection (a) shall be sufficient if it states—*

*(1) the date on which the serious health condition commenced;*

*(2) the probable duration of the condition;*

*(3) the appropriate medical facts within the knowledge of the provider regarding the condition; and*

*(4)(A) for purposes of leave under section 6382(a)(1)(C), an estimate of the amount of time that the eligible employee is needed to care for the son, daughter, spouse, or parent; and*

*(B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the employee's position.*

(c)(1) *In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 6382(a)(1), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning any information certified under subsection (b) for such leave.*

(2) *Any health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employing agency.*

(d)(1) *In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).*

(2) *The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employing agency and the employee.*

(e) *The employing agency may require that the employee obtain subsequent recertifications on a reasonable basis.*

#### **§ 6384. Job protection**

(a) *Any employee who takes leave under section 6382 for the intended purpose of the leave shall be entitled, upon return from such leave—*

*(1) to be restored by the employing agency to the position of employment held by the employee when the leave commenced; or*

*(2) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.*

(b) *The taking of leave under section 6382 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.*

(c) *Nothing in this section shall be construed to entitle any restored employee to—*

*(1) the accrual of any seniority or employment benefits during any period of leave; or*

*(2) any right, benefit, or position of employment other than that to which the employee was entitled to on the date the leave was commenced.*

(d) *As a condition to restoration under subsection (a), the employing agency may have a policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work.*

(e) *Nothing in this section shall be construed to prohibit an employing agency from requiring an employee on leave under section 6382 to periodically report to the employing agency on the status and intention of the employee to return to work.*

#### **§ 6385. Prohibition of coercion**

(a) *An employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of the rights of the employee under this subchapter.*

(b) *For the purpose of this section, 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation).*

#### **§ 6386. Health insurance**

*An employee enrolled in a health benefits plan under chapter 89 who is placed in a leave status under section 6382 may elect to continue the health benefits enrollment of the employee while in leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909) through the employing agency of the employee, the appropriate employee contributions.*

**§ 6387. Regulations**

*The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1991.*











CMS LIBRARY



3 8095 00016871 2